DOCUMENT RESUME

ED 264 982 RC 014 065

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TITLE	A Critical Analysis of the Indian Child Welfare Act of 1978.
PUB DATE	3 Dec 79
NOTE	451p.; Appendices may not reproduce clearly. Paper prepared for a social work course, University of Montana, Missoula.
PUB TYPE	Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC19 Plus Postage.
DESCRIPTORS	American Indian Reservations; *American Indians; Children; *Child Welfare; *Federal Indian Relationship; *Federal Legislation; Federal Regulation; Hearings; Political Attitudes; Political Issues; Self Determination; Social Problems; *Tribal Sovereignty; Tribes; Trust Responsibility (Government)
IDENTIFIERS	Bureau of Indian Affairs; *Indian Child Welfare Act 1978; *Montana

ABSTRACT

Questions about the usefulness of the Indian Child Welfare Act of 1978 are raised in this paper, which emphasizes references to the federally recognized tribal governments of Montana. Part 1 presents an historical overview of the political status of American Indians, especially issues that have influenced federal and tribal attitudes toward Indian child welfare legislation. Part 2 compares specific provisions of Senate Bill 1214, House Resolution 12533, and Public Law 95-608--known as the Indian Child Welfare Act--concluding that the final bill is a poor compromise of the original intent as written in Senate Bill 1214. Part 3 looks at dissenting views presented to House and Senate committees and observes that the majority of dissension came from political leaders in Montana and was intended to postpone action on the legislation. Part 4 views proposed regulations for the Indian Child Welfare Act and presents a critical assessment of the role played by the Bureau of Indian Affairs in drafting regulations. Appendices contain a variety of related material including correspondence and texts of the bills and proposed rules and regulations. (JHZ)

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A Critical Analysis of the Indian Child Welfare Act of 1978

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by

Karl O. Edwards

3 December 1979

Social Work 471

Missoula, Montana

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The issue of child welfare in the United States has long been one of bitter controversy, legal entrapments, bureaucratic abuses, public disapproval in all specific incidents which are only followed by apathy, and totally hit-or-miss policies. For the American Indians, child welfare has run the gauntlet of these and more. Within child welfare policies, delineated for Native Americans and applied by the Bureau of Indian Affairs and their allied federal, state, and private sister agencies, there exists underlying tones of the dominate societies masked aspiration of total assimilation of Native Americans. Incorporated into this attitude is a history of legal/jurisdictional complications that stem from the political policies which have attempted to dictate "Indian Affairs", and inherently child welfare programs.

The congressional enactment of Public Law 95-608, the Indian Child Welfare Act, on 8 November 1978, is being presented as a guideline solution for implementing new policies in Indian Child Welfare. The outward appearances of this bill demonstrates potential to be encouraging. In retrospect, however, of the history leading up to the bills enactment, the inconsistencies between the actual bill and proposals, the implications imposed by key officials that are opposed to the Act, and the Bureau of Indian Affairs' proposed implementation of the Act, all raise serious questions as to the actual usefulness of the Act. The interest here then, is to focus on a few of these aspects/questions by reviewing some of the available materials. Whenever possible, specific reference will be made to information pertaining to the federally recognized Indians of Montana.

Part One: Historical Highlights leading to the Indian Child Welfare Act.

Imperative to understanding the need for the Indian Child Welfare Act, and what its ramifications can/will be, is acertaining a comprehensive understanding of the unique status of the American Indians and their tribal/reservational governments. Within Montana there are seven federally recognized reservations: Blackfeet, Flathead, Fort Belknap, Rocky Boy and Northern Cheyenne reservations having tribal governments that were organized and chartered under the Indian Reorganization Act of 1934 (IRA); Crow and Fort Peck reservations having tribal governments that were not affected by the IRA, but still work through the Bureau of Indian Affairs and the Secretary of the Interior. All these tribal governments (as well as tribal governments in other states) nonetheless retain many aspects of sovereignty, delineating these political units as distinct organizations. Through this retention of sovereignty, tribal governments have certain "powers" within the boundaries of their reservations which include (but are not limited to) the right to self-government; to define tribal membership; to regulate domestic affairs; to tax; and to control, through tribal laws enforced by tribal courts, the conduct of tribal members.[1]

The history of this unique status of American Indians began within a few years of the European invasion of the Americas. The law of natural course of events dictates that the "conquering" peoples will mandate what is to be. The Europeans, through their "God-given" rights issued certain policies that shaped the history of the Americas since the 1500's. In 1537 Pope Paul III issued the Sublimis Deus declaring that Indians were people, and as people had certain inherent rights. From this "fact" Europeans found themselves bounded to "treat" with the Indians--after either peaceful or warlike confrontations. Thus distinct tribes were treated as sovereign peoples, and the policy of treaty making began.

The rise of the United States began a new era as "the United States Constitution reserved the responsibility for dealing with Indian tribes solely to the federal government under the clause in Article II which concerns treaty making."[2] Furthermore, Clause 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; . . .[3]

Lastly, Clause 3, Section 8, Article I of the Constitution reserves the power to regulate commerce with "Indian tribes":

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[4]

This clause cited above, of the Constitution can be seen as the first step towards tainted sovereignty. From this clause it is clear that: "Therefore, the federal government, and not the separate states, is the ultimate arbiter of the legal status of Indian Tribes through acts of Congress"[5] (underlined emphasis added).

The United States Supreme Court, the final authority on defining the federal Constitution, further bastardized the sovereignty of American Indians in two consecutive decisions. In 1831, Chief Justice John Marshall in the case of the Cherokee Nation vs. Georgia ruled that while the Indians were not amenable to state law, they were nevertheless "domestic dependent nations" who could be controlled by Congress. "This dictum has retained significant force as a description of the self-governing status of Indian tribes."[6] This decision changed interactions from "treating" to regulating.

The second decision of immense impact came in 1832, when Chief Justice Marshall established federal plenary power over the regulation of Indian affairs in Worcestor vs. Georgia:

> (The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.[7]

Chief Justice Marshall further formulated Indian sovereignty:

> . . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence--its right to self-government--by associating with a stronger, and taking its protection.[8]

In a more recent and damning decision handed down in the United States vs. Wheeler (March 22, 1978) it was stated that "(There is an) undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."[9]

The accumulation of treaties, Constitutional clauses, supreme court decisions, and Congressional acts which are founded on the first three, creates this special relationship between the Native Americans and the federal government. Through treaties many tribes are entitled to special services and benefits, which through supreme court decisions, such as the United States vs. Kayama, 118 U. S. 375 (1886), and in the United States vs. Nice, 241 U. S. 5591 (1916), have determined that these entitlements are a dependancy, to be regulated by Congress.[10]

The implication of this is seen in the "Declaration of Policy," in Senate Report 95-597:

> Section 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.[11]

It is seen therefore that because of this special relationship that services--in this case, child welfare services--are provided to Indian tribes by the federal government. Additionally:

> . . . since Indians were made citizens of the United States in 1924, they are entitled to all the rights, benefits and responsibilities from local, state, and federal governments to which all other citizens are entitled. The Indian Reorganization Act of 1934 gave tribes the right to establish their own governments, which also have some responsibility for child welfare services, particularly through tribal counts. Child welfare services may therefore be provided by any of four governments--federal, state, local, or tribal.[12]

That there are jurisdictional problems can be ascertained by the fact that there are four levels of government rather than the customary three levels. The crux to this problem, however, can be seen in the malicious refusal of state and local governments to recognize and work with tribal governments, and the ineptness of the Bureau of Indian Affairs to properly prescribe federal policies. It is the hopes of many that the Indian Child Welfare Act will address and overcome these handicaps, along with many other problem areas.

Critical to solving any problem in society is the attitude of the people; that is, if they refuse to change--or even look at alternatives--changes, short of drastic measures such as war, cannot occur. Attitude is a vital key to accomplishing anything in life. Unfortunately in today's mechanized, computerized, methodical, ill-disciplined, apathetic, wasteful, and narrow-minded megalopolisized American society, attitudes have developed split "personalities" or meanings, which can be seen as purported attitudes and actual attitudes. Purported attitudes are those expressed by someone because of legal or "moral" reasons, and actual attitudes are those which are expressed in "safe environments"--this may be a closed group like the KKK or MOD, or in an open group of people like the Catholic Church where it is known that all share common attitudes--without the threat of recourse, legal or otherwise, and can be assumed to be the true attitude. The assumption is not, however, that for all individuals/groups there is a dichotomy in attitudes, but rather that this is often the case for people who must work with others that may prescribe to different attitudes.

In reviewing the federal policies above, the tone of the attitudes can be fairly percieved as domination and assimilation; and that these attitudes have permeated the social services, and thus the tone of attitudes in child welfare, may be formulated.

In consideration of state involvement in child welfare, policies must be reviewed because:

> Both the Social and Rehabilitative Services of the Department of Health, Education, and Welfare (SRS/DHEW) and the Bureau of Indian Affairs (BIA) agree that provisions of social services on the part of the BIA are supplementary to the provisions of services by states under the Social Security Act.[13]

The assumption can be made from this statement and the lack of material on/by the Bureau of Indian Affairs, that the Bureau of Indian Affair's--hence the federal governments'--actual attitude towards social services has been one of "pass-the-buck". The next step then is to review material on state policies in dealing with child welfare, and other services in regards to Indian Reservations.

One of the earliest documents discovered was the report, 1960 White House Conference on Children and Youth for Montana, which was endorsed and forwarded to the Secretary of Health, Education and Welfare by Governor J. Hugo Aronson. In this report 31 of the total 64 pages (48 percent) are spent discussing the "problems of Indian youth", purporting to be a presentation of "facts". In looking at the "Introduction" of this "Report of the Committee on Problems of Indian Youth", basic attitudes can be ascertained:

> In Indian communities, problems are frequently intensified because of the cultural differences, the poverty, the concentration of a minority group, and the economical background [14] (underlined emphasis added).

It is further delineated that action should be taken because:

> Since the federal government is relingquishing (sic) more and more of its services to the states, Montana residents should be aware of the problems that do exist in Indian communities, and citizen groups should be studying and working towards a solution of these problems[15] (underlined emphasis added).

The report is divided into six different sections: Health, Recreation, Education, Welfare, Economic Factors and Indian Youth, and History of Religious Influences on the Montana Indian. Based on these concepts, the report seems to be designed to objectively evaluate specific problems. After reading these reports, however, one cannot help but understand that the "real" problems they are presenting are: (1) lack of federal funds to assist the state's total take over; (2) the need for greater Christian emphasis due to "pagan backsliding";[16] and (3) a need for capital to "rape" the reservations of their resources through industry/business on or near the reservations. In essence the report had nothing to do with youth problems, although they did manage to appropriately address some real problems:

> The Indian has no experience, knowledge or understanding of the equally strange traditional aspects of the dominate society.[17]

And:

> There is little interest, energy, or willingness on the part of members of the white society living on or near reservations, preoccupied in making a living from the land and accumulating wealth for a rainy day, to bridge the gap.[18]

In fact, it would seem that the committee even had a basic understanding of Indian families, and their children's welfare:

> The protective rules affecting children, together with the religion-like training and precept by the elders--were so well established that delinquency of juveniles, desertion or neglect, were not problems of Indians. The terms had no meaning to them[19] (underlined emphasis added).

Despite this seemingly basic understanding, and the fact that the report continues to demonstrate that the church, schools and laws have forced change, the State does not even consider the possibility that non-acceptance could occur. Rather, the report indicates immediate needs for "bureaucratic help" and greater acculturation of measures, because:

> . . . a great many Indians have accepted the principles and standards of non-Indian society and are making satisfactory progress.[20]

The temptation to analize this report in detail is great, however, due to the fact that the reports do not really address youth or youth problems in detail, it seems futile to do so. Some words, however, need to be directed to the highly fantasized discussion of "Religious Influences of the Indians of Montana", to demonstrate not so much the ignorance of the data but rather the callousness, the superiority of Christianity and the dominate societies attitudes plantly expressed, and the assimilative mien of the whole.

The discussion opens stating that, "Religion has always been an important factor in the life of the American Indian", followed maliciously by: "Influences on the religious ideas and outlook of Montana Indians have come from many sources, including Catholicism, Protestantism and the ancient pagan beliefs.[21] The tone is that "ancient pagan beliefs"--whatever these may be!--have been a subordinate, but negative influence.

Even more inaccurate, insensitive, condemning and callous is the following statement:

> Most tribes of Montana have worshipped the sun from earliest times, and the belief that the sun is a supreme beling is still held by some of our contemporary Indians.[22]

In reading this essay one cannot help but wonder what is trying to be presented. In quote after quote one is harangued on the history of the efforts to bring Christianity to the "pagans", the incredulity of ancient "pagan" beliefs, and that religion has played an important role in the Indian's history. The closing remarks, however, impose the meaning of the essay--that is, that the Indians of Montana are backsliding from Christian beliefs, and that this is evil and the root of many problems--in crystalized form:

> "A recent study in the Great Falls area has indicated, unfortunately, that church attendance among the Indians seems to decrease when they leave the reservations . . . this situation is particularly appalling when we recall that to their forefathers a century ago, religious practices were an important part of everyday life"[23] (underlined emphasis added).

The main thrust of this report, or the real attitude of policy in Montana in 1960, was to "help" the Indians to become tax-paying, religious, upright, moral, assimilated Indians.

The next available document on Montana Indian Affairs is, A Study of Problems Arising From the Transfer of Law and Order Jurisdiction on Indian Reservations in the State of Montana (1 July 1961). The report deals primarily with jurisdiction in that the state of Montana desires jurisdiction, but not financial burden. Of key note in the report are two relevant areas that indirectly influence child welfare. In their recommendations, which requests stringent guidelines by the federal government, the state includes a catch-all statement that would allow state control based on inability:

> Tribes which cannot effectively govern in every department or adequately enforce the law, yet desire to continue their governments, should agree to transfer the functions in question preceived to the States, under proper safeguards.[24]

Yet of more incredible importance is the following recommendation, which should have been adapted then, but still has not:

> The judgements to tribal courts should be made enforceable through the state judicial system.[25]

The issues for the State then, at this time period (1961), was one of "big brother" attitudes. That is, the state through this document is saying the federal government needs to clarify issues to protect the rights of the Indians. However, the undertone of the document is one of: go ahead and let them try, they'll fail anyway, and by clarifying problem areas, the state can then take full control--all to say the States are a bunch of nice guys, and will win anyway!

Unfortunately, there is a gap in immediately available literature, and the next document, Indian Criminal Justice Systems, was published sometime in 1972/1973 (no publishing date). This fact, however is not so critical upon review of the document, as it is clear that attitudes changed little in eleven years. The attempt of Indian Criminal Justice Systems is to bring to light that:

> The lack of adequate correctional facilities on reservations has become a priority problem due to a recent Montana Supreme Court decision (Blackwolf vs. District Court, 493 P. 1293 (1972)) which restricts the jurisdiction of state district courts over offenders to state institutions.[26]

They further elaborate, in a statement that clearly reflects real attitudes:

> A great deal of planning is needed in the area of jurisdiction before a critical situation becomes intolerable[27] (underlined emphasis added).

The real purpose then is a threat to jurisdiction of the state, with this resultant publication describing the deplorable and differing standards of tribal justice systems, and the threat that Title II, Equal Rights Act, will have to tribes. The importance of reviewing this document is that it is representative of the states position on tribal justice systems and their attitudes to work with/against it. In the following statements these attitudes seem fairly clear:

> Other social and economical difficulties inherent to the American Indian culture, which has been well documented and frequently stated, are inseparably interwoven with their specific criminal justice system problems, and as a direct result present a unique set of varying circumstances not found anywhere else in the annals of criminal justice records.[28]

And:

> The Indians in Montana have perhaps the most critical situation that exists in the state today concerning correctional facilities--both adult and juvenile.[29]

And where is the policy recommendation of statewide acceptance of tribal judicial systems in statements like this one:

> Along with this, of course, is the same basic lack of standards and training required for those persons charged with the responsibility of dispensing justice through the Indian court system.[30]

The problems addressed in this document may or may not be viable ones, however it would seem to be ones that need to be questioned and dealt with by tribal governments with input from the federal government. Clearly the attitude here is one of attempting to assert power, and thus jurisdiction, over tribal governments by the state without the given authority. The impact for this report is seen in the fact that the state is proliferating the standards by which state services will work with reservations --that is in the mind of the state there are problems inherent to reservations, which thus gives authority to apply standards to deal with the reservations. In the case of child welfare they (the state) are implying that the problems--whether it is "abandonment", lack of money, or alcoholic/criminal problems--are inherent to Indian reservations. The absurdity of this is clear to someone who comprehends even a little of Native American life ways.

The last two documents are two components, Volume II and III, of a Title XX needs assessment for the State of Montana. A quick review of the ideas presented in Volume II, will be made first. Volume II, the Social Condition and Social Service Target Populations of Montana Counties, is prepared data for future use, being " . . . a study of the social conditions of Montana and its constituent counties", and it, " . . . explains the size of Montana's needy populations."[31] By looking at this report the attitude of the staff can be fairly evaluated. It is therefore appropriate to look at the states criteria for "youth-hardship":

> This implies a situation in which disproportionately large youthful populations exist in conjunction with phenomena reflective of hardhsip situations. The variables elicited from the second configuration of correlations (CSRD; 1974) forms the following index: (1) Fetal deaths; (2) Live births; (3) Population under 5 years of age; (4) Median age; AFDC cases; (6) Hepatitis cases; and (7) Salmonellasis and shigellosis cases.[32]

Such standards would almost undoubtedly include Indian reservations in Montana, and indeed they do: "the counties listed in the first group are, again, the sites of Indian reservations or portions of an Indian reservation."[33] (As if everyone knew this!) The recommendation for the above "problem" of youth-hardship is given: "recommended youth services would include day-care, foster care, diversion and intervention programs."[34] Three out of four can be seen as steps of getting the Indian youth out of their reservation environment and into what the state considers a productive environment.

In looking at the section on "Youth Services," the State's attitude is only too clear:

> The limited information available, however, does suggest that child abuse is more common in locations characterized by poverty. For Montana, this would imply those counties with Indian Reservations, which are characterized by a disproportionate number of poor and young residents.[35]

In a viscously implicating circle of distorting figures and trends, misunderstandings and prejudiced attitudes, the reservations have been portrayed here as a bastion of child abuse, and that " . . . these children have been abused and neglected by their families and need the assistance of a foster care home."[36] (Note: this quote was not specifically directed towards Indian populations in the text, but the pretense is clear.) It can be seen then in this official report that was recently rendered (December 1976), that it is strongly advocating removal of Indian children from their families. Furthermore, it clearly establishes that reservations are in extreme need of assistance, and the assumption being that the state will provide this assistance through Title XX funds.

The final publications to be reviewed in conjunction with reviewing Montana's policies towards reservations within its boundries is Social Conditions and Social Services on Montana's Seven Indian Reservations, Volume III (1977). The purpose of this report given in the introduction purports consideration of "all residents and all geographic areas, of Montana" and that "the reservations and their residents have a special place."[37] It further states that, "with the above in mind, the needs assessment project established a special 'sub-study' to directly address the concerns, issues, and problems of the reservations and their people."[38]

In the part titled "Overview of Indian Population and the Reservations," the report ignorantly states that the "underlying causes of social problems are common to all Indians regardless of their reservations."[39] Some of these problems are claimed to be as seen as their rural location, large dependency ratios, low/poor employment, and alcoholism and its associated problems.[40] This part of the report is concluded with this relatively controversial statement:

> All of the above mentioned factors are important when considering the underlying causes of social service needs. These factors, along with the social and cultural differences between Native American and the "non-Indian" population of Montana, account for most of the social service needs of this States' Reservations.[41]

It would seem that in this overview one must question the attitudes and motives of the state in their efforts to assess the social services needs on reservations. Further credence is given to this insipid understanding that is profferred from the above discussion when looking at the parts for specific services discussed in the report. For purposes of this report, however, only the documentary part on "Youth Services" will be discussed.

The part on "Youth Services" begins stating that approximately 40.8 percent of the Indian population falls in to the youth category and, "since these persons are totally dependent on their elders and society for their livelihood and upbringing, they automatically become a group in need."[42] This is a very implicating and/or ambiguous statement, and can be easily construed to mean that these youth, Indian children as such, are in and of itself a qualification for need. In the very next sentence this imprudence is further promulgated when it is stated, "the services required by these individuals due to family neglect or financial inability, span the entire spectrum of social services."[43] In this "factual" statement the stage is set completely: By being Indian the children are in need, because the parents are neglectful or financially strained. No mention of standards of the community, the attitudes of the youth, etc., are considered; only the almighty Christian-dollar's of the American standard is viewed, or deemed necessary.

In a Catch-22-type statement, this document (Volume III) verifies this author's proposal of what the real undertones and attitudes of the State of Montana's Volume II, The Social Condition and Social Service Target Populations of Montana Counties report are as reflected upon above, and arrogantly rendered in this later report (Volume III):

> Protective services for Indian children and youth is greatly needed on the reservations in this state. In Volume II this need is established. Of Montana's 56 counties, all of the major reservation counties rank within the top quartile for 'youth hardship.'[44]

What has happened then, is the State has established standards to measure youth hardship that must necessarily incorporate Indian youth, thus they feel they've proven a need for assistance; but just in case, the mere fact Indian youth are Indian, and their parents are Indian, further establishes need, and also neglect, which combined is evidence for intervention and removal. The only stumbling block to this incredible scheme to destroy Indian cultures, by the State, is the simple fact that legally the State has been unable to connive jurisdiction from the tribe and/or tribal court system--in spite of constant efforts to do so.

In addressing the "jurisdictional problem" the report makes a rather conciliatory comment, but follows it by a more satirical and self-damning statement (especially in light of the above discussion of recommendations in A Study of Problems Arising From the Transfer of Law and Order Jurisdiction on Indian Reservations in the State of Montana (1961), where tribal court recognition is deemed mandatory):

> The tribal courts have complete control and jurisdiction over all Indian children in need of protective services. Yet the tribal courts do not have total jurisdiction over the providers of these services, these providers being the State of Montana, the individual counties and the United States Department of Interior's Bureau of Indian Affairs (BIA)[45] (underlined emphasis added).

The implication here can easily be seen as saying, if the State of Montana had jurisdiction over Indian children there would be no problems of providing services. This attitude will be seen as influential later in the report, in understanding dissension to the Indian Child Welfare Act. Crucial to these attitudes expressed by the State towards problems on Indian reservations, because indeed problems are there, is their misunderstanding of Native American lifeways and beliefs to the point of absurdity; the gulliblness of the State to take stereotypes as facts; the State's inability to recognize Native Americans as distinct people comprised of individuals, not "Indians"; and the State's ever present desire to bring Native Americans into the folds of the great American melting pot, because the majorities' way is the best-and-only-way to live. (Not to mention the fringe material benefits that could be acquired through the assimilation process by the State and non-Native Americans--e.g., whatever the Native Americans have left, such as pride, culture and natural resources.) Through expressions of these attitudes, which in essence is total disregard of Native American people, the State perpetuates obsticales to self-determination and continues to discriminate against the Native Americans of Montana and elsewhere.

In reviewing and interpreting these State documents many positive aspects have been omitted, especially from the earlier ones. The perhaps not so sound reasoning for this is, that it is viewed that any negative attitude will unfortunatley renunciate the positive. Secondly, as alluded to above, often times attitudes expressed positively are done so out of a legal binding to do so. In more recent documents it is difficult to ascertain how positive attitudes were even presented, the negative so outweighing the positive. The State policy then can be viewed as, trying to obtain control over Indian reservations while the federal government picks up the tab.

Historical evidence of state and federal policy clearly substantiates the need for the Indian Child Welfare Act, as examined above. It stands now to review the history of specific policies and problem areas that climaxed in the creation and introduction of Senate Bill 1213, and the eventual enactment of the Indian Child Welfare Act of 1978. The verification of the problems within Indian Child Welfare as being one of long standing has been demonstrated, however, the preponderance of the initiatives to alleviate these problems has occurred only within the last five to eight years; that is, brought to the awareness of persons capable of initiating actions. In addressing such potential actions, two reports from within the social work discipline will be reviewed, and then the historical/background material presented with the proposed Senate and House Bills will be discussed.

The first report, Legal and Jurisdictional Problems in the Delivery of SRS Child Welfare Services on Indian Reservations, in which discussions of child welfare services and policy alternatives, including proposed means of coping with the perceived problems, are presented by the Center for Social Research and Development (CSRD):

> The purpose of this project (report) was to define and analyze legal and jurisdictional problems concerning the delivery of SRS services on reservations and to explore means of coping with these problems.[46]

Of further interest here, are three problem areas that were "uncovered" (or perhaps restated would be more proper):

> (1) Conflicting legal interpretations about the roles and responsibilities of state or county offices in providing certain SRS services on reservations;
> (2) State rulings that the state cannot license facilities on reservations; and
> (3) reluctance of some state courts and state institutions to honor tribal court orders.[47]

It is unmistakable that the same problems identified many years ago still exist. It is pointed out that because of these above problems, the result is non-availability of SRS child welfare services on many reservations.[48] It is further asserted that:

> It should be stated at the outset that these state-county systems do provide child welfare services to non-Indian residents of reservations . . . Limitations are only for services to Indian people.[49]

It is also explained that on three of the ten reservations involved in the study, that on "Zuni, Navajo, and Gila River, the tribe is directly involved in providing child welfare services."[50] All these reservations lie within or partly within, the state of Arizona, which tends to indicate that where the childs' interests are really the focal point, legal problems can be adequately by-passed; however, it would seem, if the child's welfare is not the main interest, conflict--and thus no services--reigns supreme.

The report points out that in the 1974 Senate hearings it was repeatedly argued and testified that "Indian children have been taken from their homes without cause," and that, "because the number of white children available for adoption has dropped drastically in recent years, Indian children are in great demand."[51] Thus, Indian children have been dehumanized to a business commodity--an article of trade, something else to keep up with the Jones', (such as two cars in the garage)--for the middle-class Americans. But, as the report details, the policy of placing Indian children into non-Indian homes is a very old one, dating from the 1880's Assimilation Policies of the Dawes Act influence. In part this is also an expression of supposed humanitarianism--it is a nice thing to do, to help a small Indian child. Such beliefs are fortified by the Bureau of Indian Affair's Indian Adoption Project (begun in 1958) which was eagerly pursued. The end result being the above findings.[52]

There are several difficiences in respect to Indian community outlooks on children and non-Indian outlooks. The first difference, as pointed out in this CSRD report, is the family relationship itself. Most local welfare services are geared towards working within the context of nuclear families, whereas most Native American families consist of strong extended family ties--that is aunts and uncles perform the duties of parents equally with the natural parents, cousins are like brothers and sisters, etc. Therefore, it is perfectly natural for a child to be "left" with other members of his extended family. However, Anglo laws create a monstrosity of this--that is the law desires to attach responsibility to an individual rather than a community--and in such manner continue to misunderstand the benefits of such family life.

A second area of difference, which is closely intertwined with the first, concerns the relationship of the child to his community.

Thus it is easily stated: "Much of an Indian person's identification and sense of belonging comes from his relationship to his tribe."[53] It would seem natural that those items that positively enhance a person's self-image must be of primary concern for his welfare. Further it is simple to see that if a person remains in an environment that will foster this self-image--in this case a child living with other members of his tribe--that he will still benefit from the sense of belonging. Lastly, the greater community interest among Native Americans supplies greater welfare for the child than the apathetic, individualistic oriented non-Native American community.

A third area of difference is within the concept of adoption itself. It is stated that ". . . the sense of taking a child into one's family, is a traditional Indian practice. What is unfamiliar is the Anglo concept that this requires terminating all relationships to the natural parents."[54] The key here is seen in the basic attitudes of terminating relationships. For many Native Americans it would seem that there is not the basic insecurity of gaining and maintaining relationships as some sort of achievement (which is rooted in individualism). It is then viewed that the need for termination of the natural parent relationships, is founded upon insecurity of the adoptive parents being eventually usurped, and thus "losing" the child back to the natural parents.

Part of social welfare is protective services which takes in many aspects including investigation of possible problems, initiating court actions, making recommendations, and perhaps most importantly providing counseling and related supportive activities. Such services are currently being offered at different degrees of effectiveness by the Bureau of Indian Affairs, county and state welfare agencies and in a few cases by tribal services. In summing up these services as presented, at the time of the report (1975) CSRD stated:

> In summary, many respondents expressed a great deal of concern about their feeling that the protective services that are provided too often have the effect of further disintegrating families rather than preventing breakdown or reuniting them.[55]

A major perpetuator of this feeling is founded in the fact that the primary services provided are only foster care and adoptive procedures. This problem is further reflected in the CSRD report itself, in that the services they discuss are foster care, residential services, adoptions, and day care; the first three being negative in nature, and none of them being capable of assisting or reuniting families adequately. Supportive services are plainly not being provided. In quoting the summary of the CSRD concerning child welfare services, the problems they have perceived are delineated in their findings:

> There are three major recurrent legal and jurisdictional problems concerning the provisions of child welfare services on these reservations (the) ten studied : (1) on some reservations and in some states there is disagreement about the roles and responsibilities of state or county offices in providing child welfare services; (2) difficulties exist in licensing facilities on reservations; and (3) some state and county courts and state institutions are reluctant to honor tribal court orders. As a result of these problems, the full range of child welfare services is not available on some reservations.[56]

In April, 1977, a national conference sponsored by the American Academy of Child Psychiatry met at Bottle Hollow, Utah, and published a report of their conference, Supportive Care, Custody, Placement and Adoption of American Indian Children. The motivational factor behind this conference can be summarized in that:

> There are, then, two trends which are both obvious and alarming: (1) American Indian children are being placed outside of their natural homes at an enormous rate; and (2) they are being given over to the care of non-Indians in very considerable numbers.[57]

In examining this conference report the opportunity of scrutinizing attitudes and perceptions of different, involved persons, on Indian child welfare will provide current key data. The conference was opened by Dr. Irving N. Berlin, President, American Academy of Child Psychiatry, and some of the key issues he raised included:

> . . . adolescent suicide could be cut by 80 percent if an elder of the tribe was placed in the jail cell with the adolescent to talk to him about his tribal traditions and his past.[58]

And:

> Thus, Native American parents or their substitutes, Native American foster parents, are the key to their children's mental health.[59]

Ms. Pat Locks, Director, Planning Resources in Minority Education, Western Interstate Commission for Higher Education, had some very meaningful comments that will be given here to demonstrate the complexities of underlying needs:

> To try to talk about the developmental uniqueness of our children within the context of the great complexity of our tribes is like asking if Finns are the same as Italians.[60]

And that:

> The values of the predominant society are three: individualism, acquisitiveness, and mercantilism . . . For every dominant-culture value you can think of, there is the exact antithesis to it in Indian societies.[61]

Concluding:

> So we have to find some way to look at parenting, learn parenting, reinforce the parenting remnants that are there. It is an obligation that we all have to learn and seek to learn in every way we can.[62]

Luther Yellow Robe, Director of Indian Education, Rapid City Public School System, discussed some other very basic issues at the heart of Indian child welfare "problems":

> Maybe with them (next of kin, extended family) he'll (the child) only get a piece of fried bread and a bowl of soup a day, but that doesn't make any difference. When he's living with his family, he's very happy.[63]

But:

> A non-Indian cannot understand the life style of Indians, so we should not be relying on non-Indians to design and provide services to us.[64]

And that:

> . . . ignorance is the greatest barriar to understanding between two peoples. If we do not understand each other, we are unable to see each other as human beings with values and dignity. The non-Indian must see that the Indian is not a historical relic but a living human being with hopes, aspirations and dreams. Indians living today in the dominant non-Indian society find it necessary to be bicultural, but Indian ways remain alive and well today.[65]

JoAnne Francisco, Papago Tribal Court, pointed out a seemingly forgotten issue that undoubtedly impacts children:

> Foster parents should want the child in their home because of him, and not because they feel sorry for him.[66]

Charlotte Goodluck, Indian Adoption Program, Jewish Family and Children's Service, gave a very interesting report on a relatively new program that she is working with. Funded in 1973 by the Bureau of Indian Affairs, Phoenix Area Office, it's emphasis is to place children within Indian families, within Arizona, and on reservations whenever possible. She made the following pertinent observations:

> . . . the program is providing unique and comprehensive services to three Indian clients--dependent children, birth parents and adoptive parents.[67]

And that:

> Extended family breakdown rather than social disapproval appears to be the primary reason for adoptive placement of American Indian children, in marked contrast to the white American community.[68]

In reference to the uniqueness of the program Ms. Goodluck provided the following guidelines that are being used:

> Services to children have been comprehensive. Guidelines for choosing homes for specific children are those of the Native American people:
>
> 1. Placement within the extended family is first explored.
> 2. A family of the same tribe is given next consideration.
> 3. Should neither of these fit the wishes of the birth parents, the needs of the child or the resources available, placement with a family of another tribe is planned.[69]

Reasoning that:

> Tribal enrollment has been a desired goal, to ensure tribal inheritance rights within the birth or adoptive tribe. To date this has been a difficult goal to reach because of a wide variance of tribal laws and eligibility requirements for membership.[70]

During the talk Ms. Goodluck referred to a study done on the program she's involved in and cites the findings. The last of these sheds some light on the reasons behind the implied success of this program:

> A comparison on birth and adoptive families revealed that the former were largely poor and unstable, while the adoptive families tended to be more regularly employed and distinguishable from other adoptive parents chiefly by their Indian heritage and identification.[71]

Clearly the standards for removal, and more particularly placement, remain the standards of the dominate society. The fact that the program is making some headway in placement, however, is viewed as a positive step in the right direction. Goldie Denney, Director of Quinalt Social Services, Washington, however concluded that on this most critical point: "Indian-related standards must be developed, for the white ones are purely materialistic."[72]

Dr. Martin Topper, an anthropologist, read the digest of his recent study on "Mormon Placement", which had some alarming concepts and facts. The LDS (Latter Day Saints) Program takes Navajo children, by presenting materialistic opportunities to poor families, and places the children in Mormon homes, purportedly for educational purposes. Dr. Topper focused upon the following difficulties:

> But the crunch comes during the summers back on the reservation--facing the poverty of his reservation family and the task of being suddenly not white but Navajo.[73]

And that:

> Economic determinations are uppermost in parents' choice to send their children; a child's religion is manipulated so he will be taken.[74]

Therefore:

> In summary, as a temporary means of survival, LDS placement is a realistic finger in the dyke. Yet in many ways, it is not conducive to long-term survival, since some dropped out of being Navajo, a great loss to the tribe and themselves . . . Overall, LDS presents a harsh psychological experience over which the Indians, adult and children alike, have no control.[75]

On the final day an extensive list of recommendations and advocations of action were drawn up. It is deemed pertinent, therefore, to list the most important of these at this point, in order to make known some of the proposals by those people directly involved in Indian child welfare, so as to adequately relate them later to the proposals of the Indian Child Welfare Act:

1. Any and all Indian child welfare programs must reinforce cultural ties.

2. The developmental uniqueness of the Indian child, e.g., his noncompetitiveness, is to be kept in mind at all times.

3. Non-Indian social workers must be educated in Indian ways (underlined emphasis added).

4. WHITES MUST BE MADE TO UNDERSTAND THAT THEY CAN BE USEFUL ONLY IF THEY LISTEN--NOT TALK.

5. Indians must gain and maintain control over social services programs, particularly because changes take a long time.

6. EVERY INDIAN CHILD WELFARE PROGRAM MUST BE BASED ON THE PREMISE THAT CHILDREN SHOULD BE KEPT WITHIN THEIR FAMILIES IF AT ALL POSSIBLE.

7. Tribal social service workers need to develop early intervention techniques to forestall family disruption.

8. Failure to preserve Indian heritage shall be viewed as an aspect of child neglect.

9. . . . further, Indians should prepare their own standards for child welfare services which reflect the Indian values of love, care, and concern.

10. The many separate human services programs--at local, state and federal levels--must be coordinated. Areas of responsibility for child welfare service provision must be clearly analyzed and defined.

11. DEVELOPMENT OF TRIBALLY SPECIFIC JUVENILE CODES IS A PRIORITY.

12. The various tribal definitions of child abuse and neglect, as well as standards for foster care should be pooled and distributed to the tribal councils (underlined emphasis added).

13. We must actively enforce the right of every child to be represented by a lawyer in potential placement proceedings.

14. Tribal authorities, e.g., judges, must be educated, especially in the basic tenet that separation of children from their extended Indian families in any form is detrimental. They must also be helped to understand that local and regional adoptive agencies are preferable to any national effort. Welfare, placement and custody issues must be dealt with at the local level.

15. As we develop our own programs, we much include both foster and adoptive parents in all aspects of care, including continuing relations with natural parents when a child is placed outside the home.

16. Police should be included in service and training programs, one goal of which should be a greater use of "cooling off" periods which can prevent many over-hasty placements.

17. Title XX must be amended to provide direct funding to Indian tribes and groups[76] (underlined emphasis added).

Thus far this report has reviewed several documents that discuss and clearly confirm a need for federal guidelines concerning Indian child welfare. Before moving into an analysis of the congressional actions, however, a study of the data presented to an by the House and Senate subcommittees will be made. This will consist of a synopsis of: a) the background reports; b) task force report on federal, state, and tribal jurisdiction; c) the final report of the American Indian Policy Review Commission; and d) the legislative history of the bill itself.

The Senate report on The Indian Child Welfare Act of 1977 (Report No. 95-597, Calendar No. 550) recaps the major activities of the Senate Committee on Interior, Subcommittee on Indian Affairs. It is stated that as early as 1973 they began receiving reports ". . . that an alarmingly high percentage of Indian children were being separated from their natural parents," and that studies ". . . indicated that in some areas (this was) as high as 25 percent of all Indian children."[77] In 1974 the subcommittee held hearings that solidified the above mentioned reports. Two critical concepts were in essence also brought out by Task Force IV of the American Indian Policy Review Commission, which are:

> First, Indian people and child welfare experts stressed the need for adequately funded tribally controlled family development programs which would function at the local level and would be able to exhibit a deeper cultural sensitivity towards the Indian people they serve. Second, Indian tribal leaders pointed out that Indian tribes were recognized by the United States as sovereign governmental units and as such the final decision making powers in areas as basic as child welfare should rest within the realm of tribal jurisdiction.[78]

These findings were further presented in the Final Report of the American Indian Policy Review Commission. As a result, on August 4, 1977, the subcommittee again held hearings, at which time it was demonstrated that the same basic problems existed, and only in rare instances were actions being attempted to correct the situation. The accumulation of this information resulted in Senate Bill 1214 being drafted for approval of Congress.

The background information presented in the House of Representative's report, Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes to Prevent the Breakup of Indian Families, and for Other Purposes (Report No. 1386), begins with reference to 1969 and 1974 surveys conducted by the Association on American Indian Affairs (AAIA), that indicated ". . . that approximately 25-30 percent of all Indian children are separated from their families";[79] and that ". . . in 1971-72, nearly one in every four Indian children under one year of age was adopted."[80] It further emphasizes that:

> the disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster care placement is at least 13 times greater[81] (underlined emphasis added).

This House report on the background leading to H. R. 12533, is full of dispairing facts and figures. It additionally focuses on other problem areas such as:

> The federal boarding school and dormitory programs also contribute to the destruction of the Indian family and community life . . . more than 17 percent of the Indian school age population of federally-recognized reservations and 60 percent of the children (are) enrolled in BIA schools.[82]

The report then addresses specific areas of difficulty that are seen to be in need of federal involvement: standards, due process, economic incentives, and social conditions.[83] The issue of standards is relegated considerably more attention in the House Report, perhaps justly so. It is pointed out that very few Indian children are removed for abuse, but rather for ". . . vague grounds (such) as 'neglect' or 'social deprivation'".[84] The ignorance of Native American cultural values on the part of most social workers; the ensuing difficulties in adequately appraising child welfare problems; and the different standards applied to alcohol abuse, are all directly advanced in this report. The resulting viscious circle that Native American families get caught up in, is attested to when one considers the above problems in relationship to this statement:

> The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.
>
> Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values.[85]

One need only contact their local welfare office or court for further proof!

The problem of organizations, that are allegedly federally subsidized, taking children away as a profit making business is also addressed in this report. Additionally, the fact that there is a need for funds to locally remedy the situation, and that such funds are not available, is treated. Social conditions are also given as perpetuating the problems: "Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem--these may be the most potent forces at work."[86] It is shown that harsh living standards are reasons for the removal of children, and that more importantly, the removal of the child is directly contributing to the cycle of poverty.

In 1976 Task Force Four rendered their final Report on Federal, State, and Tribal Jurisdiction, the portion on child custody being included in Senate Report No. 95-597. This Task Force Four Report points out that the actions of removing Indian children from their families is a very old practice, and legislatively supported in the 1880's with the enactment to establish boarding schools. It is stated that although boarding schools still exist, allegedly "the more preverse practices, fortunately, appear to have receded," and the "current issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions."[87] The report then raises issues concerning the differences between Indian and non-Indian cultural values and the inherent influence in respective courts, along with invidious misjudgement of needs by welfare workers.

Other problem areas are also addressed, such as the difficulty in locating Indian foster and adoptive homes, although the jurisdictional problems of licensing are not pointed out. Another problem area that was highlighted is that tribes are often unaware of actions being taken by the state: "there is no existing requirement that the public or private social service agencies, whether they are close by or in distant cities, have to notify a tribe when they take action with respect to any tribal member."[88] The demography of this problem is given in detail by states, and a recap of this data can be found in Appendix A. Because of the relevancy to this report, the data for Montana will be cited:

> There are 15,124 Indian children under 21 in Montana. Of these, 541 (or one out of every 30) Indian children has been adopted; 87 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is one out of every 144.6. There are, therefore, by proportion, 4.8 times (480 percent) as many Indian children in adoptive homes as there are non-Indian children.
>
> There are 534 (or one out of every 28.3) Indian children in foster care. The foster care rate for non-Indians is one out of every 363.5. There are therefore by proportion, 12.8 (1,280 percent) as many Indian children in foster care as there are non-Indian children.[89]

Of final interest to this report is the recommendations made. It is noteworthy to mention that in the more recent report by the American Indian Policy Review Commission (1977) the exact same recommendations were made, but with the deletion of para e (ii), and para f, as given below:

a. The issue of custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists.

b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken.

c. The tribe of origin shall have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, shall have an affirmative obligation--by specific programs--to:

   (i) provide training concerning Indian culture and traditions to all its staff;

(ii) evaluate and change all economically and culturally inappropriate placement criteria;

(iii) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant federal financial resources should be appropriated for development and maintenance of Indian operated foster care homes and institutions:

(i) in reservation areas such resources should be made directly available to the tribe;

*(ii) in off-reservation areas, such resources should be available to appropriate local Indian organizations.

*f. The Secretary of the Interior should authorize:

*(i) to undertake a detailed study of the manner and form of child placement records;

*(ii) to definitely determine the full statistical picture of child placement as it currently exists;

*(iii) to require standardized child placement recordkeeping systems from all agencies receiving federal monies;

*(iv) to require annual reports from such agencies pursuant to the mandatory recordkeeping system;

*(v) to review all rules and regulations of the federal government with respect to child placement, and revise such, in consultation with Indian tribes and child placement agencies to reflect federal policy of retaining Indian children in Indian homes (asterisms (*) indicate items not included in the American Indian Policy Review Commission's Final Report, May 17, 1977).[90]

Senator James Abourczk sponsored a proposal concerning Indian child welfare, Senate Bill 3777, during the 94th Congress. This bill was referred to the Senate Committee on Interior and Insular Affairs and the Subcommittee on Indian Affairs. Unfortunately, there was no action taken and the proposal died out.

On April 1, 1977, Senate Bill 1214 was sponsored by Senator James Albourezk and cosponsored by Senator Hubert Humphrey and Senator George McGovern. Hearings were opened on August 4, 1977, and passed the Senate Select Committee on Indian Affairs on October 28, 1977. Senate Report No. 95-597 was consequently published November 3, 1977, outlining findings and presenting supportive documents for the Bill. Senate Bill 1214 was passed on November 4, 1977, and referred to the House, and its respective Committee on Interior and Insular Affairs.

The House Subcommittee on Indian Affairs held hearings on February 9 and March 9, 1978. As a result of the hearings the House Subcommittee on April 18, 1978, marked up S. 1214 and adopted a substitute that was introduced by Mr. Udall, et al., as House Resolution 12533 on May 3, 1978. H. R. 12533 was further amended and passed July 24, 1978, at which time a full report of the findings and discussions were printed in House Report No. 95-1386.

On October 14, 1978, H. R. 12533 was considered and passed by the House. Passage of this was vacated, and Senate Bill 1214, recently further amended, was passed in lieu. On October 15, 1978, the Senate concurred with the House amendments, and on November 4, 1978, the revised Bill was considered and passed by the Senate. On November 8, 1978, the Bill became Public Law 95-608, the Indian Child Welfare Act of 1978.

A considerable amount of space has bwen spent scrutinizing and focusing on different issues that have influenced the history of Indian child welfare. It is perceived, regardless of possible repetitiveness involved, that the concerns behind the enactment of the Indian Child WElfare Act must be adequately presented before an active analysis of the two proposed bills and their amendments, that eventually became the law, can be performed. The issues of concern, as well as historical events, have been presented as completely as is feasible. Hopefully, to allow as complete a picture as possible, including points of view not exactly parallel/tangent to those of the People themselves. The primary functions of bringing such issues to the front are to make them known (for those unaware of them); to allow one to relate just how many of these issues are actually addressed by the new law; and perhaps more importantly, to hopefully serve as a partially consolidated list of issues from which new, enlightened, direct actions can be initiated--solutions are left to others. With this background knowledge the full impact of the law may be discerned. Such analysis will include discussing those issues/sections that were dropped from the proposals, those added to the proposals, and those issues that are not addressed at all, especially in light of past recommendations, as discussed above.

Part Two: Discussion and Analysis of S 1214, HR 12533, and PL 95-608.

In analyzing the proposed bills, Senate Bill Number 1214 (S 1214) and House Resolution Number 12533 (HR 12533), and the Act itself, Public Law Number 95-608 (PL 95-608), the accepted abbreviations for these documents will generally be used rather than the full nomenclature. Discussion will generally be limited to ascertaining the true intent, along with a few comments in the range of potential implications. The analysis is intended to be carping of each section, and indeed, even of terms themselves, so that the potential of the Act, worthy or not, can be realized.

Section 1. Section 1 was gramatically changed between S 1214 and HR 12533, in that "1977" was changed to "1978". This change was ultimately incoporporated into PL 95-608, so that the Act may be cited as the "Indian Child Welfare Act of 1978".

Section 2. Section 2 is a discussion of dingins conducted by each respective committee. In the Senate's own analysis it is stated that the intent is clear, however, in the House's analysis of its bill their intent of the findings is to lay "foundations for the power and responsibility of the Congress to legislate in the field of Indian child welfare."[91] Close scrutiny between the Senate's proposal for this section and the House's, delineates obvious changes in attitude.

S 1214 opens with "recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people . . ."[92]

Whereas HR 12533 starts with (differences underlined), "recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . ."[93]

It is clear that HR 12533 is attempting to assert a big brother relationship attitude over the more responsible, neutral language of "relations" in S 1214. Furthermore, HR 12533 has eliminated "for the care of" from its responsibilities, while at the same time they are generalizing the Bill into terms difficult to interpret accurately.

Greater differences in the changes of attitude are seen within the sub-paragraphs. First of all, HR 12533 deemed it necessary to document through other legal actions the authority of Congress to pass the Act, which is not included in S 1214:

> (1) That clause 3, section 8, article I of the United States Constitution provides that "the Congress shall have Power * * * to regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) That Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) That there is no resource that is more vital to the continued existence and integrity of the Indian tribes than their children and that the United States has a direct interest, as trustee in protecting children who are members of or are eligible for membership in an Indian tribe.[94]

Obviously the motivation behind this rider or addition is to reassert the trust relationship, or rather, the Big Brother syndrome. It is almost dichotomatic in attitude, as on one hand it expresses the attitude of: we are passing this Act to help the poor Indians because it is our burden to do so; and on the other hand it is implying: Indians are damn lucky this Act is being considered by the big White Father. In either case the introduction of these facts is to transpose the thrust of the findings from outrageous problems to one of jurisdictional necessity. That is, instead of portraying the problem as hardhsip--thus playing down the whole noxiousness of the real problems.

This illusion is further lucidated by inspecting the other subparagraphs. Section 2 (4), HR 12533, is essentially the same as Section 2 (a), S 1214, except that the gist of its implications is again altered by different wording as shown below, by underlining the differences:

> (4) That an alarming high percentage of Indian families are broken up by the removal, often unwarranted, of

> their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . .[95]

Whereas S 1214 reads:

> (a) An alarming high percentage of Indian children living within both urban communities and Indian reservations, are separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies and are placed in institutions (including boarding schools) or in foster or adoptive homes, usually with non-Indian families.[96]

The purpose behind these changes is distinctly to neutralize the reality or harshness of the findings, particularly where the finger is pointed towards being the state and federal governments' fault. Therefore ambiguous references are created when terms such as natural parents are substituted with the appellation of just parents, or government agencies becomes public agencies. More blatantly, HR 12533 ignores the facts and problems distinct to both urban communities and Indian reservations through abbreviation to the phrase "Indian families", which is to generalize the groups intended to be impacted by the Act, and thus eventually negate the "urban communities" if possible from inclusion in the Act. Of further condemnation is the deletion of "private individuals" found in S 1214 from the findings in HR 12533, thus denying acknowledgement to one of the worst problems--kidnapping, child stealing, or whatever one wishes to call it.

The emphasis of HR 12533 is to down play the findings, and to turn specifics into glittering generalities, becomes cognitively obvious when one compares Section 2 (5), HR 12533 with Section 2 (b) and (c), S 1214; the former being nothing more than a summary of the latter, but without the coherent, intended impact:

> (5) That the States, exercizing their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families.[97]

The above statements is obviously far less potent and nondefinitive in comparison to those findings presented in S 1214:

> (b) The separation of Indian children from their families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand the nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the agency officials involved are unfamiliar with, and often disdainful of Indian culture and society; (4) the conditions which led to the separation are not demonstrabely harmful or are remedial or transitory in character; and (5) responsible tribal authorities are not consulted about or even informed of the nontribal governmental actions.
>
> (c) The separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesireable. For the child such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism, and drug abuse, suicides and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For the Indians generally the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-governing communities, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.[98]

Although the first statement may seem merely a generalization of the second at first glance, closer analysis will show that in reality it is misrepresenting the issues/facts altogether. In the statement from HR 12533, "exercizing their recognized jurisdiction" implies that the states have been conducting business in accordance to all interpretations of the law, and that the law currently does not take into consideration cultural values only. Thus this is further evidence of a transformation in attitudes underlying the intent for the Indian Child Welfare Act. It is obtrusive denial of the very problems that prompted Senator Abourezk to propose passage of the Act, and a total irresponsibility in generalizing the Act, consequentlially muddling interpretations to reverse the potency of the Indian Child Welfare Act will become crystallized through analysis of the specific policy included in the body of the Act.

The fact that this section has been only gramatically altered, does not negate the fact that in the process the whole truth findings of the Congressional investigations are no longer presented. The goal is obviously to tone the implications of the section down to a level that States can at least, to a degree, tolerate the language, as well as the Act itself. A comparison of Section 2, as finally presented in PS 95-608 (see Appendix D) with HR 12533 (see Appendix E) readily exhibits that the wording is exactly the same. It can be seen in light of this discussion, along with the review of Section 2, PL 95-608 in conjunction with the analysis of the issues presented in the first part of this paper, that the findings are reported in Section 2, PL 95-608, are incongruent and misrepresentative of the reality of Indian Child Welfare problems.

Section 3. Section 3 is the Congressional declaration of policy--that is, the purpose or explanation of why the Act was created. From within the different policy statements, a completely different policy emerges as the professed policy of the Indian Child

Welfare Act. The intent of this section is once again perceived to be clear in the Senate's sectional analysis. The intent of this section, as perceived by the House however, in their sectional analysis, ludicrously reads:

> As amended, the section makes clear that the underlying principle of the bill is in the best interest of the Indian child. However, the committee notes that this legal principle is vague, at best. In a footnote on page 835 in the decision of Smith vs. Offer, 431, US 820 (1977), the Supreme Court stated:
>
> > Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child", to avoid decisions resting on subjective values.[99]

The total audacity of the House to even consider terminology, let alone in Federal Policy, that is vague and subject to differing decisions is totally uncomprehensible, and a total failure to properly perform their job--which is to create legal, explicit laws for the United States. Unfortunately this is now a fact of history, and therefore the intent for HR 12533 is ambiguously "in the best interest of the child", a wontonly willful inclusion that refutes all attempts to delineate a policy and a completely knowledgeable damnation of the Act--leaving the entire issue of what is "in the best interest of the (Indian) child" entirely open to litigation; whereas the Senate policy would have at least reflected primitive guidelines.

Before further analyzing Section 3, HR 12533, it is important to survey the section in S 1214, to determine what the Senate's policy states. This policy will be stated here, verbatim, with key items that will not be found in Section 3, HR 12533, underlined:

> The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and

> legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.[100]

As stated in the Senate's own sectional analysis, the intent of the law is to establish standards for placement and to lay a foundation for Indian family security. The next step then is to cite the House policy, again underlining key or different issues, in order to properly compare them:

> The Congress hereby declares that it is the policy of this Nationa, in fulfillment of its special responsibility and legal obligations to the American Indian people, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[101]

This stated objective is then, designed to "protect the best interest of Indian children", and to establish standards "for the removal of Indian children". This is demonstrably a turn around in policy statement from the original meaning of S 1214. The HR 12533 policy statement in and of itself demonstrates ignorance, and prejudicial procedures, on the part of the House (and subsequently Congress), by gearing the policy towards the child rather than the family.

Secondly, instead of establishing apositive attitude of "standards for placement", HR 12533 establishes negative attitudes through a policy of, "Standard for the Removal," of children. What this is seen as doing, is to reaffirm the attitude that Indian children still must be removed, and that only the rules for doing so are being altered. The original purpose was to establish standards for placing children outside of the family, if and only if it is determined to be in the best interest of the family, not the child.

There are several other differences between the original Senate policy and the House policy statements, but only two others will be considered. First of all, of the original Senate policy was to discourage unnecessary placement of Indian children in boarding schools, but it should be pointed out that this obviously negative reflection of federal performances has been obnoxiously eliminated from consideration in the policy of HR 12533. This unexcusable deletion of this cancerous issue further substantiates the reversal in policy thought/attitudes from helping alleviate the problem to one of compounding them through denial of them, and dubious statements. Secondly, this attitude is further perpet-uated in the change of one word, "development", to read "service", in the discussion of the specific policy assisting tribes. That is, the original aspiration was to provide assistance in "family development programs" that would re-establish or cement the "stability and security of families" (S 1214). The term "development" is interpreted as implicating progressive, relevant, productive, and cultural processes that are initiated through the tribal governments. The demonstrateable policy in HR 12533 is to develop "family service programs", which is the same as saying that current service programs, as offered at local levels, will now be fully implemented by federal support; essentially the same short range, short fuse programs now being utilized by welfare agencies will continue to be used.

At this point it should be fairly obvious that from the original innovative concepts found in Section 2 and 3 of S 1214, HR 12533 has been aborted into a defamating, pretentiously ambiguous, and irresponsible reverification of current attitudes and satus quo. That is, Section 2, HR 12533 denies the facts, and Section 3 merely restates current policy--removal, etc.--but written now to imply that the Indian child's culture must be kep in mind; and no statement about the tribes involvement in implementation, only a reiteration of the existing conditions--e.g., "service programs" instead of "development programs".

A condemning difference between Section 3, HR 12533 and Section 3, PL 95-608, is that the phrase, ". . . in fulfillment of its special resonsibilities and legal obligation to the American Indian people" (HR 12533), has been deleted from the Public Law. The obvious implication of this deletion is a flagrant rejection and denial of treaty obligations which have been substantiated by the judicial system. This deletion in turn validates the supposition here that PL 95-608 is not in truth what it is claiming to be, but rather a sadly satirical facade to extend theoretical self-determination; while in reality it is merely changing the words, but the results remain the same. The policy, as stated in PL 95-608 then, is nothing more than the same old policy--promise to give utopia, when in reality you mean to do nothing at best, and more probably, institute further decadence.

Section 4. Section 4 is written to define congressional interpretation of specific terms utilized in the law. S 1214 incorporated the definitions, "for purposes of this Act", [102] of eleven terms, while HR 12533 defines twelve terms; with the Public Law incorporating in essence those definitions defined in HR 12533. A review of the items deleted from S 1214 in HR 12533 will be made first, then an analysis of added definitions, and last a critique of the differences. It is deemed imperative here, once again, to closely scrutinize small changes in terminology that could have permanent implications, as well as focusing upon the attitude of the terminology.

Sub-paragraph (f), section 4 of S 1214 defines the term "nontribal public or private agency", which was excluded from HR 12533 and PL 95-608. The intent of this definition was to affirmatively establish that "nontribal public or private agencies" included all such organizations which ". . . has jurisdiction or which performs functions and exercises responsibilities in the fields of social services, welfare and domestic relations, including child placement."[103] The elimination of this definition constitutes acknowledgement of a loophole in the act, that could in a sense allow certain agencies to claim exemption from the law because it was not specifically spelled out. This can readily be a viable foundation for the assertion that the Mormon Church is not included in the Act.[102] The possible impact in deletion of this definition becomes poignant, and therefore, understandably evokes a serious question as to the honest intent and aspirations of the Act.

HR 12533 adopted from S 1214 definitions of "Indian child", "Indian child's tribe", and "Indian custodian", which were in turn incorporated intact into the Public Law. There is not need, therefore, for defining these terms. Of interest, however, are the declared intentions for defining these terms. In particular, discussing their ideas of "Indian child", the House report asserts:

> The committee rejects the use of the term "merely" by the Department of Justice to qualify the eligibility of an Indian to be a member of an Indian tribe, particularly with respect to a minor. Blood relationship is the very touchstone of a person's right to share in cultural and property benefits of an Indian tribe . . . an Indian child, who, because of his minority, does not have the capacity to make reasoned decisions about experiencing his right to enroll in a tribe[104] (underlined emphasis added).

The House Report in addressing their understanding (or ambiguity?) of "Indian child's tribe" propounds that, "it is assumed that the appropriate official can make a reasonable judgement about which Indian tribe . . ."[105] Although the need for clearly defining this terminology is obvious, it is just as clear that this definition and intent only add to confuse the problem more--for instance, who is the appropriate official", and what is a "reasonable judgement"?

Perhaps one of the few clear, definitions, and positive statements found in the House Report, is the definition for "Indian custodian":

> Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, includuding the right to protect the parental interests of the parents.[106]

The implications of the attitude behind the Act becomes alarmingly suspicious when analyzing the differences in terminology addressing the underlying thrust of the Act itself. The terms come from

Section 3, concepts: "child placement" being used and defined in S. 1214, and "child custody proceedings" being used and defined in HR 12533. The definitions are drastically different as could be assumed by just looking at the total difference in the terms, and the attitudes they project.

Before critiquing the actual definitions, the intent for defining the respective terms needs to be explained. The Senate Committee states that the definition of "child placement" is intended to imply all proceedings, "to include proceedings against juveniles which may lead to foster care and proceedings against status offenders, i.e., juveniles who have not committed any act which would be a criminal act if they were an adult . . .,"[107] that is, it was meant to include all proceedings of any "nontribal public or private agency--to include the Mormon Church. "Child placement", as defined by S 1214, would have included the elusive nine month educational foster program of the Mormon Church, which is no longer the case, as will be shown, because of the bastardized House definition. (This point further substantiates the calamity induced through the elimination of the terminology, "nontribal public or private agency".)

In discussing their intent for "child custody proceedings", the term used in lieu of "child placement", the House committee defuncts it "by defining four discrete legal proceedings included within the term "placement, which proved to be amgibuous.[108] The points become clear in that the House proposes to limit the definition, thus the Act, to four specific proceedings, rather than the all incompassing "child placement", they defend this change, because the House Committee felt the term "placement" proved to be too "ambiguous".[109] By using this limited definition, "child custody proceedings," instead of "child placement", and synthesized with the failure to unobstructively define "nontribal public or private agency", an inimitable loophole is created that is being prostituted by the Mormon Church now, and is unmistakenly available to other nontribal public or private agencies with similar quasai foster child proceedings!

As was indicated above, "child custody proceedings" is categorized by the definitions of four discrete legal proceedings:

> (1) foster care placement, (2) termination of parental rights, (3) preadoptive placement, and (4) adoptive placement.[110]

This is defining four legal methods to remove Indian children, rather than addressing proceedings to help them; immediate concern becomes one of how this definition of the term "child custody proceedings", which is clearly the emphasis and purpose of this act, can possibly help alleviate the removal of Indian children when it is inherent to the Bill's/Act's own meaning and purpose. The "attitude" can be concluded from this, then, that the Indian child welfare problems are perceived as previously being extra-legal measures, but now will be legal proceedings, for the removal of Indian children--despite the professed attitude of supposedly arresting the disproportionate problems currently occurring in Indian child welfare.

In adopting the definition for "child custody proceeding", into Public Law, one addition was made in defining "foster care placement". The definition is presented as the removal of Indian children for temporary placement in foster homes or institutions, in HR 12533; the Public Law, however, includes with these ideas the concept ". . . or the home of a guardian or conservator . . ."[111]

Having reviewed the major differences in Section 4, it remains to look at disparities in definitions/implied meanings of the terms that were maintained from S 1214 through incorporation into PL 95-608. It should be pointed out that the definition for the term "Indian organization" remained consistant throughout all Congressional actions. Furthermore, the terminology for "Secretary" was adopted as found in S 1214, deleting only the phrase "unless otherwise designated" from the definition in HR 12533. The emphasis of the meaning for the term "Indian tribe" was similarly not altered by the substitution of "the Secretary" in the Public Law in lieu of "the Bureau of Indian Affairs"; and the change in the cited sections of the Alaska Native Claims Settlement Act was an updating function. Lastly, the term "tribal court", though the words are rearranged, carried the same interpretation, that any tribal court or administrative body, can be authorized child welfare jurisdiction under the Act. The remainder of the terms had changes great enough to alter to some intensity the meaning of each term, as will be documented below:

In reading the two different definitions for the term "extended family member" the shift in attitudes, from S 1214 to HR 12533, of what the term is to include, can be observed as a negatively directed effort to limit the meaning of "extended family member". This limiting is accomplished by reversing ideas, and their respective emphasis, along with changes in phrases. The intent of the Senate definition is not only to emphasize the critical importance of the extended family members--which is also the stated intent of the House definition[112]--but explains what is understood to be included within the concept "extended family member". S 1214 intended the definition to include relatives "whether by blood or marriage" or "adoption" who are over eighteen years of age, or "otherwise emancipated", or "as defined by tribal law or custom".[113] It is important to note that this term is defined with four distinct concepts (which are indicated above by underscoring the word "or" that separates these concepts), which allows a fairly broad designation of the total definition. The House definition, however, limited the term to two concepts: "as defined by law or custome of the Indian child's tribe or, in the absence of such law or custom", can be one of the specifically listed relatives who has "reached" eighteen.[114] The main emphasis of the definitions remain the same, however, despite these limitations, which is to recognize the extended family members as bona fide members of the child's family and as potential/ actual guardians. The definition, as presented in HR 12533, unfortunately, was incorporated into the Public Law intact.

In defining the term "Indian" the definitions varied, and changed in each step of Congressional actions. The fundamental difference between S 1214 and HR 12533 was the deletion of the phrase "or who is eligible for membership in a federally recognized Indian tribe",[115] which is once again a obvious limiting process by the House. The Public Law does, however, expand the scope somewhat by specifically including Alaska Natives ". . . who is an Alaska Native and a member of a Regional Corporation as defined in Section 7 of the Alaska Native Claims Settlement Act (85 Stat 688, 689)"[116]

In defining the term "parent" HR 12533 continues to limit the significance and purposes. The intent of S 1214 was to include both natural parents or parent, and "any person who has adopted an Indian child . . ."[117] However, HR 12533 limits "any person" to "any Indian person who has lawfully adopted an Indian child", and furthermore excludes "the unwed father where paternity has not been acknowledged or established".[118] The impact of this to exclude non-Indian persons from the definition of "parent", which could be a potential loophole and harbinger of paramount implications; and it perniciously excludes a particular group of fathers from this law. The definition as presented in HR 12533 was inevitably implemented verbatim into PL 95-608.

The term "reservation" was slightly changed by the House in HR 12533, but demonstrably altered when finally approved in PL 95-608. The Senate explains "reservation" to be:

> The purpose of this definition is to include within the provision of this act tribes within the State of Oklahoma some of whose reservations may have been totally disestablished, as well as tribes such as the Sisseton-Wahpton or the Rosebud Sioux whose reservations have recently been found by federal court decisions to have been diminished by virtue of federal allotment and opening status enacted at the turn of the century. The definition states that the territory to which the tribal authority will be recognized to extend under this act extends to the last boundries of the reservation which were recognized immediately prior t-o the act which caused the diminishment or disestablishment of said reservations. The definition also includes lands held by Alaska Native villages under the Alaska Native Claims Settlement Act (89 Stat. 688).[119]

HR 12533 excluded direct reference to Native Alaskans, but was otherwise essentially the same as S 1214. The definition "reservation" in both proposals included the idea of ". . . the term shall include the lands with in the last recognized boundaries of such diminished reservations prior to enactment of the statute which resulted in the diminishment or disestablishment".[120] PL 95-608, however, both limits and expands the definition:

> "Reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.[121]

The immediate impact of this somewhat ambiguous definition is to exclude those tribes, that have been disestablished, from "the provisions of this act", as purported by the Senate's intent, described above. Secondly, it does not completely recognize a "reservation" with boundaries including lands that were previously lost. It does, however, include land that has been purchased by the tribe or individuals. The real impact of this definition of "reservation" is not so pertinent to this particular act, but it could have tremendous impact in future issues. Furthermore, the phrase "subject to a restriction by the United States against alienation" is inviting further legislation in this area to further limit the definition of "reservation"; it is also a brilliant example of a predictively inappropriate attitude in Congress, and their abusive dealings with the Native Americans.

It would be ludicrous to say that this is not an opinionated interpretation of the terminology and intent, however, in retrospect of past history, the possibilities of these interpretations become less ludicrous. The mere fact that such an interpretation can be methodically demonstrated, regardless of the unorthodox processes utilized here, should illuminate a need for extreme caution in accepting the Public Law as presented. The purpose of this critical analysis is to focus upon such ambiguous terminology and meanings to highlight such potential problem areas.

Title I: Child Custody Proceedings

A discussion of Title I is an extrmely arduous task because the House Committee completely rearranged, restructured, and completely rewrote portions of Title I, making it almost undistinguishable from that which the Senate proposed. Furthermore, the attitude, purpose, meaning and ultimate impact as presented in HR 12533, and ultimately PL 95-608, is drastically different from, and more limiting than, S 1214, as already previously demonstrated for other portions in the discussions of this paper. In discussing Title I, four parts will be included, beginning with an analysis of those sections presented in S 1214, but deleted from HR 12533; secondly, a critical, comparative analysis of the sections with similar intent/concepts; thirdly a critical analysis of those sections added to HR 12533; and lastly, an analysis of any changes between HR 12533 and PL 95-608. (As a working framework for this comparative analysis portion, respective sections of Title I, HR 12533 will be listed first, and the respective section in S 1214 will be cited second, which hopefully will add some continuity to the discussion.)

1. Analysis of deleted portions of S 1214. Section 102 (b), which was deleted from the Act read as follows:

> In the case of an Indian child who resides within an Indian reservation which possesses, but does not exercize jurisdiction over child welfare matters, no child placement, by any nontribal public or private agency shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless such jurisdiction is transferred to the state pursuant to a mutual agreement entered into between the State and the Indian tribe pursuant to subsection (j) of this section. In the event that no such agreement is in effect, the Federal agency or agencies servicing said reservation shall continue to exercize responsibility over the welfare of such child.[122]

The motivation of the Senate committee was to reassert a "declaration of existing laws that excludes Indians within federally recognized reservations from the application of State laws".[123] The key phrase is ". . . no child placement, by any nontribal public or private agency shall be valid or given any legal force and effect . . ." when the deleted terminology "nontribal public or private agency", as defined and discussed earlier, is now remorsefully understood as a momento to US forfeiture from the law. That it's excluded from HR 12533 compounds the impact of the overall statement in that any actions on the part of "nontribal public and private agencies" will not be enforceable or illegal. Teh implication of deleting this section is clearly part of the ambiguous process utilized by the House to limit the Act.

Section 102 (d), also deleted from the Act, read as follows:

> In the event of a temporary placement or removal as provided in subsections (a), (b), and (c) above, immediate notice shall be given to the parent or parents, the custodian from whom the child was taken if other than the parent or parents, and the chief executive officer or such other person as such tribe or tribes may designate for receipt of notice. Such notice shall include the child's exact whereabouts, the precise reasons for his or her removal, the proposed placement plan, if any, and the time and place where hearings will be held if a temporary custody order is to be sought. In addition, where a tribally operated or licensed temporary child placement facility or program is available, such facilities shall be utilized. A temporary placement order must be sought at the next regular session of the court having jurisdiction and in no event shall any temporary or emergency placement exceed 72 hours without an order from the court of competent jurisdiction.[124]

The intention of this section was to elaborate specific actions that must be accomplished by an agency removing the child under emergency conditions, pursuant to a tribal court order, under the authority of joint jurisdiction, or under state jurisdiction for

Indian children residing off the reservation. It furthermore required placement in tribal facilities if available, and that temporary placement orders must be secured within 72 hours. Calamitously none of these guidelines are incorporated in the Public Law, the implication once more is that the deletion provides for amiguity in execution and interpretation of proceedings. Even more implicating in the deletion of this section is the inevitable challenge of the integrity, honesty, and sincerity of Congress in respect to their reasons for passing PL 95-608, particularly as an act "to protect the best interest of Indian children".

Section 102 (e), also eliminated from the Act, read as follows:

> For the purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents, or the extended family member in whose care he may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, is resident.[125]

The intent of this section was to broaden the impact of several terms previously defined; and to demonstrate the interdependence of such upon each other. That is, the reservation as defined, is implicit to understanding the child's residency, as it is to understanding the child's extended family, and their tribal laws and customs. It furthermore, clearly establishes residency for purposes of jurisdiction. Elimination of this guideline completely diminishes the ramifications and potential of the Act.

Section 102 (f), another aspect eliminated from the Act, read as follows:

> For the purposes of the Act, whether or not a nonreservation resident Indian has significant contacts with an Indian tribe shall be an issue of fact to be determined by the court on the basis of such considerations as: membership in a tribe, family ties within the tribe,

> prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship. A finding that such Indian child does not have significant contacts with an Indian tribe sufficient to warrant a transfer of jurisdiction to a tribal court under subsection (c) of this section does not waive the preference standards for placement set forth in section 103 of this Act.[126]

The intent of this section was quite clear, in that it establishes guidelines for courts in determining disposition of jurisdiction in the case of an Indian child, with due consideration for his cultural best interests. It defines the concept of "significant contact", which again is a positive consideration of the Indian child's best interest. Failure to include such a section in the Public Law is distinctly an act of gross negligence by Congress and is indeed total, real denial of cultural uniqueness. Such thoughtlessness will certainly irritate the courts, and will require delicate explanation in the future. (Indeed, such guidelines were presented upon demand in the Federal Register, Volume 44, No. 79, pp. 24600-02.)

Section 102 (h), also eliminated from the Act, would have read as follows:

> Any program operated by a public or private agency which removes Indian children from a reservation area and places them in family homes as an incident to their attendance in schools located in communities in off-reservation areas and which are not educational exemptions as defined in the Interstate Compact on the placement of children shall not be deemed child placements for the purposes of this Act. Such programs shall provide the chief executive officer of said tribe with the same information now provided to sending and receiving states which are members of the Interstate Compact on the Placement of Children. This notification shall be facilitated by mailing written notice by registered mail to the chief executive officer or other such person as the tribe may designate.[127]

This section demonstrates the awesome power of particular organizations, and is a clear, unequivocated effort to exempt programs such as the Mormon Church. Indeed the Senate Committee states" "the intent of this section is to exempt placements under these programs from the application of all other provisionsof this act . . ."[128] This section was undoubtedly the most damaging, derogatory, maliciously negative portion included in S 1214. The unfortunate part is that, although this particular section was eliminated from the law, other deletions have provided similar loophole exemptions, as explored above in this paper. (It should be noted that this was most likely the "Mormon exemption clause" referred to in other reports,[129] and is indeed an overt attempt to do so. It is also a clear redition of the purpose now covertly threatening the implementation of the Act."

For the most part then, those sections not included in the House version of the Act were definitive in nature. The elimination of them clarifies the negligent failures of Congress to provide guidelines for Indian child welfare. Such sections were, in most probability, considered too potent, too explicit, for incorporation.

2. Critical analysis of congruent sections. Section 101 (a), HR 12533/Sections 103 (d), and 102 (a), S 1214: Section 101 (a), HR 12533, is in essence a refined statement that synthesizes ambiguity from aspects found in portions of Sections 103 (d) and 102 (a), S 1214. The clause "except where such jurisdiction is otherwise vested in the State by existing Federal law" (Section 101 (a), HR 12533), is found to be conflicting with concepts in Section 108, HR 12533, which stipulate that such tribes can apply for jurisdictional authority, but only through approval of the Secretary; the

conflict being that Section 101 (a) sets a precedent to negate Section 108, as indeed it is alluded to in Section 108 (b)(2) itself. This term is furthermore seen as conflicting with Section 101 (b), which states "the court . . . shall transfer such proceedings to the jurisdiction of the tribe." The combination of the two subparagraphs, Section 101 (a) and (b), would tend to purport that the intention is to invest child welfare jurisdiction to the tribe, but as alluded to, this process is not retroactive as purported, rather it is an ambiguous process of interpretations, which ultimately must be approved by the Secretary based on the open-ended powers bestowed upon him in Section 108.[130] Section 102 (a), S 1214, was just as ambiguous on this matter, however the terminology for cases where tribes do have jurisdiction was fare more definitive: "no child placement shall be valid or given any legal force and effect, unless made pursuant to an order of the tribal court" (Section 102 (a), S 1214). In reference to terminology on tribal court wards (Indian children) the statement in S 1214 is substantially stronger: "Where an Indian child is placed in a foster or adoptive home, or in an institution, outside the reservation of which the child is a resident or with which he maintains significant contacts, pursuant to an order of a tribal court, the tribal court shall retain continuing jurisdiction over such child until the child attains the age of eighteen" (Section 103 (d), S 1214). Public Law 95-608, naturally, is not this specific!

Section 101 (b) and (c), HR 12533/Section 102 (c), S 1214: the term ". . . in the absence of good cause to the contrary . . ." in Section 101 (b), HR 12533, is an extremely dubious one, especially in retrospect of the discussion above that demonstrated that HR 12533 failed even to define "significant contact", least of all "good cause". The House cites as part of their intent, that this section is to ". . . permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."[131] This attitude can be none other than token, as it obviously leaves the decision of "good cause" in the hands of the State courts, whom will undoubtedly continue with the status quo. The terminology that was used in S 1214 was definately more concrete, and would have established precedence; indeed the Senate states: "the provisions are new to the law and establish the right of a tribe to participate in proceedings in State courts involving placement of a child who has significant contacts with said tribe, and also authorizes such tribe to seek transfer of jurisdiction to its own court".[132] Admittedly, Section 101 (c), HR 12533, also authorizes the tribe the right to intervene, but the force behind either Section 101 (b) or (c), HR as533, is not as strong as Section 102 (c), S 1214 would have been:

> In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a state, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless the tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party in the child placement proceedings. In the event that the intervening tribe maintains a tribal court which has jurisdiction over child welfare matters, jurisdiction shall be transferred to such tribe upon its request unless good cause for refusal is affirmatively shown.[133]

It should be noted that the term "good cause" is also applied, but that the clearness of the guidelines given makes interpretation more implicit. Furthermore, there is no confusion about jurisdiction, as is the case with Section 101 (c), HR 12533.

Section 101 (d), HR as533/Section 105, S 1214: The intent of Section 101 (d), HR 12533, and Section 105, S 1214, is to mandate that all bodies of government will give "full faith and credit" and/or recognition to all decisions of Indian tribes/tribal courts dealing with Indian child welfare proceedings. Section 105, S 1214, was less susceptible to erroneous interpretation by availing specific terminology: ". . . under the Act and to any tribal court orders relating to the custody of a child . . ." (section 105, S 1214); however, the House terminology is better here, than in many instances!

Section 201 (a), HR 12533/Section 102 (g), S 1214: The intent of this section in both bills is to ensure that in an involuntary State proceeding involving an Indian child the party seeking the change must notify the parent(s) and tribe. The provisions and presentations in the two bills are substantially different. Section 201 (a), HR 12533 provides that if the identity of the parents, custodians, or tribes, cannot be determined the Secretary is to be notified, and that "no foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian or the tribe or the Secretary" (Section 201 (a), HR 12533). These guidelines were not included in the respective section of S 1214, but, for the most part, these guidelines are appropriate and needed.

The term "Indian custodian", however, is very restrictive in nature, because it excludes non-Indian custodians. Section 102 (g), S 1214, on the other hand had important guidelines that were left out of the Act. Further intent was to provide for notification to each tribe that a child may have "significant contact with", and that each tribe had the same rights provided for in the Act, including intervening on behalf of the child. It further stated "that the judge or hearing officer at any child placement proceeding shall make a good faith determination of whether the child involved is Indian and, if so, whether the tribe or tribes with which the child has significant contacts were timely notified" (Section 102 (g), S 1214). The intent, thrust, attitude and guidelines of this statement were vital to the section, and pointedly demonstrates once again the uselessness of HR 12533. This completely supports the opening terminology of S 1214, "it shall be the duty of the party seeking a change . . . " (Section 102 (g), S 1214), and emphatically illustrates the leniency of the opening terminology of HR 12533: "the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . ." (Section 201 (a), HR 12533). The House statement not only allows maximum prerogative of the "seeking party", rather than requiring it, too; but it also fails to cover all aspects of "child custody proceedings" or child placement. Although the intent of the section is basically the same for both bills, and HR 12533 incorporates positive guidelines, the section as defined in the Act is meaningless and without force.

Section 102 (b), HR 12533/Section 101 (d), S 1214: The intent of this section in both bills is to ensure "than an indigent parent or Indian custodian shall have a right to court-appointed counsel in any involuntary State proceeding . . . (and) where State law makes no provisions for such appointment, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of such counsel".[134] The only point of incongruity is the statement "subject to the availability of funds" which is given in the HOuse report, but no espoused in the Act. The statement in Section 102 (b), HR 12533 for the most part is stronger than Section 101 (d), S 1214, in that it provides greater details.

Section 102 (c) and (d), HR 12533/Section 101 (a), S 1214: The contents of these sections is innovative and imperative, and unfortunately the statements in Section 102 (c) and (d), HR 12533, are extremely streamlined versions of Section 101 (a), S 1214. Due to this critical importance, the sections from both bills will be cited to illustrate the loss of potency in the House version:

Section 102, HR 12533,

> *(c) Each party to a foster care placement or termination of parental rights proceedings under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.
>
> (d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[135]

Section 101, S 1214,

> (d) No placement of an Indian child, except as provided in this Act shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional wellbeing of the child is immediately and seriously

> threatened, unless (1) his parent or parents and the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody according to tribal law or customs, has been accorded not less than thirty days prior written notice of the placement proceeding, which shall include an explaination of the child placement proceedings, a statement of the facts upon which placement is sought, and a right: (A) to intervene in the proceedings as an interested party; (B) to submit evidence and present witnesses on his or her own behalf; and (C) to examine all reports or other documents and files upon which any decision with child placement may be based; and (2) the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been made available and proved unsuccessful.[136]

The idea asserted in S 1214, Section 101 (a), part (1) are more inclusive of intent and emphasis that Section 201 (c), HR 12533; and in fact subsection (c) of Part (1), Section 101 (a), S 1214, is the only aspect incorporated in Section 201 (c), HR 12533. The emphasis or impact of Section 201 (d), HR 12533, however, is seen as being stronger than the statment in part 2, Section 101 (a), S 1214; whereas the phrase "active efforts have been made to provide . . .", in Section 201 (d) is seen as bolstering the impact of the purpose--which is to say such services must be shown regardless of availability. The strength of the overall statement of Section 101 (a), S 1214, is seen in the phrase, "no placement of an Indian child, except as provided in this Act shall be valid or given any legal force and effect; . . . unless . . ." This phrase makes it perfectly clear what is intended, that it is to establish legal precedence for Indian child welfare placement/proceedings. The Act, once again, doesn't state it so clearly.

Section 102 (e) and (f), HR 12533/Section 101 (b), S 1214: The provisions of these sections are another set of critical and innovative guidelines and standards. In reviewing the House comments for intent of this section the question of integrity must be raised once again:

> While the Committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated (from, "beyond a reasonable doubt").[137]

How nice of them! But they fail to mention any other guidelines, as did Section 101 (b), S 1214; in reference to determination of what can be deemed serious conditions for the child:

> In making such determination, poverty, crowded or inadequate housing, alcohol abuse or other nonconforming social behavior on the part of either parent or extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, shall not be deemed prima facia evidence that serious physical or emotional damage to the hcild has occurred or will occur. The standards to be applied in any proceeding covered by this Act shall be the prevailing social and cultural standards of the Indian community in which the parent or parents or extended family member resides or with which the parent or parents or extended family member maintains social and cultural ties.[138]

The standards and guidelines expounded in this statement are imperative to the Act, yet they are to be found no where in the Act, nor even alluded too. This elimination of such a critical part of the bill is an outrage, and nothing more than an absolute rebuttal of the purpose and purported attitude of Congress, and the Act, which is "to protect the best interest of Indian children." This is impossible without establishing federal guidelines and standards to work by.

Section 103 (a), (b), (c), and (d), HR 12533/Section 101 (c), S 1214: Section 103 (a) - (d), HR 12533, essentially incorporates the concepts and intentions of Section 101 (c), S 1214, which are minimum guidelines for voluntary proceedings. These guidelines include the requirement of the judge certifying that he is satisfied that the parent or custodian fully understands the consequences of such consent, and that the parent or custodian had everything interpreted into their native language if they do not have a command of English; that the parent or custodian may withdraw consent to foster placement at any time; that the parent or custodian may withdraw from adoptive proceedings at any time up to the final decree; that an appeal can be filed if any part of the Act was violated; and that no consent can be given ten days after or prior to child birth. HR 12533 additionally places a two-year limit on the right to appeal adoptive cases. Strong points in S 1214, that is not so strong in HR 12533, is that no final decree of adoption could have been made ninety days prior to and for ninety days after, child birth.

Section 105 (a), HR 12533/Section 103 (a), S 1214: The intent of this section of both bills is to establish a federal policy of placing an Indian child for adoption in an Indian community if at all possible. It is significant to note that Section 103 (a), S 1214, provided for four preferances: (1) to the child's extended family; (2) to a Indian home on the reservation where the child resides or has significant contacts; (3) to an Indian home where the family head or heads are members of the tribe with which the child has significant contacts; and (4) to an Indian home approved by the tribe. Whereas, Section 105 (a), HR 12533 combines (2) and (3) to read "other members of the Indian child's tribe". While the distinction is not necessary, it is one more example of disinterest where clear, precise guidelines would have been most appropriate.

Section 105 (b) and (c), HR 12533/Section 103 (b), S 1214: The intent of these sections in both bills is to establish a federal policy of placing an Indian child for foster care or nonadoptive placement into an Indian community if at all possible. As above, the provisions in S1214 would have established broader guidelines over those established in the Act. The priorities established in Section 103 (b), S 1214, provided for placement in the order of the extended family, an Indian foster home, licensed or otherwise, on the reservation of the child's tribe, to a foster home licensed by the child's tribe, to any other Indian foster home approved by the child's tribe, to any foster home run by an Indian family, and lastly, to a custodial institution operated by Indians. In this case however, the terminology of HR 12533 sufficiently covers the same guidelines as set in S1214. Additionally, Section 105 (c), HR 12533 provides guidelines for rearranging the priorities:

> Where appropriate, the preference of the Indian child or parent shall be considered: provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.[139]

This statement provides for protection of the parents to remain anonymous if they desire such.

Section 105 (e), HR 12533/Section 103 (c), S 1214: The intent of this section, of both bills, is to require the State to maintain records showing that efforts were made to comply with the preference standards of Section 105 (e), HR 12533, or Section 103 (c), S 1214, respectively, and to ensure that such records are made available to the tribe and Secretary. The wordings, and meaning are basically the same.

Section 106 (a), HR 12533/Section 101 (c), S 1214: The intent of Section 106 (a), HR 12533, is to authorize the biological parent(s) or Indian custodian to petition for the return of the child if the adoptive family or the adoptive parents volunteer consent to terminate, regardless of State laws, and that the child will be returned unless there is a "showing . . . that such a return would not be in the best interest of the child"[140] The provisions of Section 106 (a), HR 12533, are stronger than the provisions of the last two lines of Section 101 (c), S 1214, in that they provide for such action in all adoption proceedings, whereas Section 101 (c), S 1214, authorized such proceedings for voluntary termination of parental rights only. In this case the statement of HR 12533, and the Act, is a stronger one, with broader impact.

Section 106 (b), HR 12533/Section 101 (e), S 1214: The intent of this section in both bills is to ensure that any changes in foster care arrangements are conducted in accordance with this act. The provisions of Section 101 (e), S 1214, were more explicit in this however, in that it required the "nontribal public or private agency" involved to notify, preferably thirty days in advance, the tribe and the parent(s) or extended family or custodian of the exact location of the child and the reasons for changing his placement. This requirement naturally would make the provisions of this section stronger, and emphatic, through its explicitness.

Section 107, HR 12533/Section 104, S 1214: The intent of this section of both bills is to allow the Indian child, upon his eighteenth birthday or after, to be informed by the court which entered the final decree to provide "information as may be necessary to protect any rights flowing from the individuals tribal relationship"

(Section 107, HR 12533), and to inform the individual of their tribal affiliation. Section 104, S 1214, stated the reason for this clearly: "In order to protect the unique rights associated with an individual's membership in an Indian tribe . . ." (Section 104, S 1214). The deletion of this statement from HR 12533, and the Act, is assumed due to the fact that it would attach a specialness or recognition/reconcilliation by Congress of the unique rights of Indians.

Section 108 (a) - (d), HR 12533/Section 102 (i), S 1214: The subject of this section of both bills is to provide provisions for restoral of jurisdiction of Indian child custody proceedings to tribes which don't enjoy such jurisdiction due to PL 83-280, or other federal laws. The version in HR 12533 is considerably different from those provisions in S 1214, and the impact is not only a more restrictive one, but also a rough denial of the Self-Determination Act, as will be shown. Subsection (b), Section 108, HR 12533, incorporates totally defiant statutes, in spite of self-determination policy, which is clearly exhibited in the House comments on this subsection:

> Subsection (b) authorizes the Secretary, in considering a petition for resumption, to take into consideration various factors affecting the exercise of jurisdiction, including membership rolls, size of reservations or former reservation, and population base. Depending on such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101 (b) or to limit the geographic scope of the full exercise of 101 (a) jurisdiction. The subsection was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.[141]

The attitude of Congress is crystal clear, and a 180 degree turn from the intent of S 1214, for which the Senate Committee stated, "the provisionsof this section include tribes in Oklahoma."[142]

The Senate meant to allow full restoration of jurisdiction for Indian child placement by the tribes by all tribes desiring such, whereas, the House is stating that the Secretary may use his discretion--in other words his personal attitudes and opinions or those of whomever he delegates--to arbitrarily restore jurisdiction; with the clear dictions to pay special attention to Alaska and Oklahoma. The backslide of this section is purposeful and an outrage; it is in defiance of the intent of this Act, and it appears to be in violation of the Indian Self-Determination Act. For many PL 83-280 tribes this section is "grass roots" denial of their ability to implement this Act; for at best, the section will provide a major obsticle, if for no other reason than it provides the Secretary with yet another arbitrary power. Furthermore, Section 108 (c), HR 12533, contains another block, if you will, in the phrase: "the Secretary shall publish notice of such approval in the Federal Register . . ." (Section 108 (c), HR 12533). This block is realistic in that, if the Secretary desires, he can procrastinate such publications for some time, thus delaying the effective date. This is important in light of Section 108 (d), the intent of which is defined that it "provides that reassumption shall not affect ongoing proceedings at the time of reassumption unless provided for in an agreement under Section 109."[143] This means that the status quo can remain until the Secretary damn well pleases! Section 108, HR 12533, and the Act, is clearly one that needs to be dealt with, with like vendetta, otherwise the potential for destroying the Act will ignite--that is, the possiblity of PL 83-280 reservations not having jurisdiction of child custody proceedings restored is great. The need for such tribes to take the ambiguity of it and define their implementations is even greater--or at least, so it would seem.

Section 109 (a) and (b), HR 12533/Section 102 (j), S 1214: The intent and meaning of this section in both bills is eventually the same, that being to authorize States and tribes to enter into concurrent jurisdiction to provide for orderly case-by-case transfers, utilization of State facilities, and for revocation of such agreements. Section 102 (j), S 1214, called for a sixty day notification or revocation, however the Act was changed to 180 days. Both provided that such revocation would not affect current cases. Section 102 (j), S 1214, also provided "such agreements shall not waive the rights of any tribe to notice and interaction in child placement nor shall they alter the order of preference in child placement . . ." (Section 102 (j), S 1214), which was, as easily predicted, eliminated from the Act.

Section 111, HR 12533/Section 102 (x), S 1214: Section 102 (k), S 1214, provided that nothing in the Act was meant to endanger or diminish jurisdiction of any party "except as expressly provided in this Act" (Section 102 (k), S 1214). The intent, however, of Section 111, HR 12533, "provides that, where State law affords a higher degree of protection of the rights of the parent or Indian custodian, such standard will be applied . . ."[144] The problem here is to define "higher degree of protection", as such a phrase is loaded with destructive potential, along with the probable conclusion that very little will change, because the State laws will always provide "a higher protection".

Section 112, HR 12533/Section 102 (a), S 1214: The context of Section 112, HR as533, is contained within Section 102 (a), S 1214, but in generalities as usual, except for the clause guaranteeing the State the right to remove an Indian child in emergencies: "nothing in this title shall be construed to prevent the emergency removal of an Indian child . . . under applicable State law . . ." (Section 112, HR 12533). The most objectionable part of Section 112, HR 12533, is the exclusion of terminology that would have delineated specific guidelines to be used, and the use of the phrase "for a reasonable time". The House fails to define "reasonable", whereas Section 102 (a), S 1214, refers one to Section 102 (d), S 1214, for such guidelines that states "in no event shall any temporary or emergency placement exceed 72 hours . . ."[145] Perhaps the best demonstration of what this section of the bill is supposed to impact and its authority, is to review the Senate committee comments of emergency removal as found in Section 102 (a), S 1214:

> The provision regarding temporary removal must be read in conjunction with (1) the last sentence of this subsection providing for a continued exclusive jurisdiction of the tribe even where the child is removed beyond the boundaries of the reservation, and (2) the provisions of subsection (d) which requires immediate notification to the chief executive officer of the tribe or his designate, utilization of tribally operated or licensed placement facilities, and requires a proceeding in tribal court within 72 hours of such removal unless the child is returned.[145]

This intent is not implied, either, as has been the case with many of the House committee comments given. These guidelines were clearly established in S 1214, but no where are they addressed in the Act.

3. Analysis of sections added to Title I, HR 12533. Section 104, HR 12533: The development and inclusion of this section is a vital and commendable addition to the Act. Although S 1214 addresses the concepts laid out in Section 104, HR 12533, under Section 101

(c) and (d), the impact in this case is not as strong as when presented under its own section, as is the case with Section 104, HR 12533, which states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 101, 102, and 103 of this Act.[147]

The problem with this however, is that the effectiveness of it is lessened by deleting any teeth from it. It is left up to the "competent" decision of the court; that is, the court holds the power of attitude and opinion, in absence of specific guidelines, to determine if "action violated any provision".

Section 105 (d), HR 12533:

The addition of this section is a weak attempt to emphasize a need to apply local attitudes, and cultural standards in consideration of "preference requirements". One of the problems of this section is ambiguity or lack of definition for the term "preference requirements", and if one were to interpret it in context of the intent of the rest of the Act, this term and section would be applicable to placement proceedings only; which is further suggested by the fact it is a subsection of the discussion on placement proceedings. In looking at the House committe's intent, this problem is verified:

> Subsection (d) provides that the standards to be used in meeting the preference shall be those prevailing in the relevant Indian community. All too often, State, public, and private agencies, in determining placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.[148]

It would seem the House assumption is that non-tribal agencies continue to be the primary licensing facilities, rather than the tribe. The need to establish this point of cultural standards, however, is important and therefore places some credence in this section. The term "prevailing social and cultural standards" could have been more fully defined, as it was in Section 101 (b), S 1214, in an attempt to have culturally unique standards applied at the beginning of proceedings, rather than at the end.

Section 110, HR 12533: This imposing guideline reads very attractively, and as being a very forceful clause, that dictates that the court is to "decline jurisdiction over such petition", where, "any petitioner . . . has improperly removed the child . . ." (Section 110, HR 12533), and that the child will be "forthwith" returned. The House committee stated, "it is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without sanction of law."[149] This concept is again commendable but it does not: (1) place pressure on the court to consider the case in good faith, or without bias, or otherwise; and (2) it does not impose punitive guidelines to admonish abusers, or to detract agencies from conducting improper removal. Once again, this is not to imply the section is negative in nature, but rather that it is extremely narrow, and missing the total objective, in lieu of the usual smaller, more ambiguous, one.

Section 113, HR 12533: This section is basically a "grandfather clause" in that is specifically delineates that the act is not retroactive, and affects only those cases occurring after the enactment of the Act.

4. Differences between HR 12533 and PL 95-608. The most apparent aspect of the above analysis is that is re-writing Title I of the Act, many specific guidelines were either eliminated or altered to the extent that their impact and meaning became inconsequential; that is, they became too general and vague to be of any real unique value. The attitude is clearly to present the Act as another token law, with little or not "teeth" to it, so that in relaity it will have only minor implications and changes on the status quo; that the true "interest" of Congress is not to present far reaching goals, but rather merely to placate, and in the process attempt to provide concrete evidence of congressional good faith.

There were some changes made in HR 12533, before its final approval into PL 95-608, and a review of these changes is necessary to obtain a complete understanding of the Title. In Section 4 (page 1), of the Act, sub-paragraph (1), (i), the definition was altered with the inclusion of an additional phrase, which broadens the import of the term "foster care placement" (added phrase underlined):

> (1) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for [illegible] placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned . . ."[150]

The inclusion of this phrase can be interpreted as positive in that the terms "guardian" and "conservator" are not themselves defined, thus allowing open-ended interpretation to the inclination of the court.

In Section 105 (c), the term "in paragraph (b)", was replaced by the term, "in subsection (b)", which was merely a change to maintain consistancy in terminology, and did not alter the meaning any. In Section 108 (a) the term "title IV of the" was inserted before "Act of April 11, 1968", which allowed greater specification of the reference, and did not alter the meaning any.

Section 112 had a substitution in terminology and a fairly elngthy inserted addition, that provides greater specification as to the meaning of the section (addition is underlined):

> "Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian . . . ."[151]

It would seem easy to assume that, "but temporarily located off the reservation", means that this section is specifically aimed at the State's emergency removal of Indian children from reservations temporarily residing off the reservation only, thus limiting the State's authority for emergency removal cases; and if this is the case, this incorporated phrase is indeed most applaudable, but this needs to be defined precisely.

In the second sentence of this section the phrase "continues only for a reasonable time" (Section 112, HR 12533), in reference to emergency removal, is eliminated and replaced with more definitive guidelines, by the phrase "terminates immediately when such removal or placement is no longer necessary to prevent immediate physical danger or harm to the child" (Section 112, PL 95-608); this change is most appropriate and provides positive force towards actions in the best interest of the Indian child and family.

Section 112 deals with the implementation of the Act, providing a "grandfather clause" in it; additionally the Act as passed provided for an additional period of time for phasing in the Law. This section now provides that it will not affect any proceedings "prior to one hundred and eighty days after the enactment of the Act" (Section 113, PL 95-608), rather than "prior to the enactment of this Act" (Section 113, HR 12533).

The implications of the changes in the policy statement and definition of terms clearly had far reaching affects on the writing, and hence the meaning, interpretaiton and impact, of Title I of the Act. The basic issues and statements of policy are found in Title I, and as demonstrated in this analysis, were profoundly altered from the Senate Bill to the Public Law. The need for a wide scope of change and improvements, the purported good intentions and purpose, the establishment and embellishment of cultural differences, and the transference of Indian child welfare, under self-determination, to the Indian tribes is not objectively, nor completely, accomplished in Title I. The Title's ambiguity, lack of aggressive policy, and most blatant absence of guidelines and policies to follow if this Title is not complied with, makes it nothing more than another piece of paper. Who is to control the vast interpretations and implementations of these "policies" of Title I? The only thing Title I really provides is another laughable set of policies and standards, which together forms an Act, that can, and will be, defied at every level because every word is subject to interpretation, and the consequences for not complying with the Act are nothing more than status quo--maybe a slap on the bureaucratic wrist, or some poor scapegoat.

Title II: Indian Child and Family Programs

Although Title II did not go through the complete overhaul that Title I did, significant changes did occur. In discussing these changes, a comparative analysis, by each section of Title II will be made, between S 1214 and HR 12533, followed by an explaination of the changes made from HR 12533 to incorporation in PL 95-608. In doing the analysis, all differences, deletions, and additions will be looked at, at the same time.

Section 201 (a), HR 12533/Section 201 (a), S 1214: The intent of this section in both bills is to provide the Secretary of the Interior the authority to make grants to "Indian tribes and organizations . . . on or near reservations" (Section 201 (a), S 1214, HR 12533), for the purposes of funding Indian child/family welfare services. Section 201 (a), HR 12533, is a streamlined version of Section 201 (a), S 1214, in that several wordy clauses were eliminated without altering the meaning of it however. The term "development" in S 1214 was replaced with the term "service" in HR 12533, but with no impact on the stated intent. The concepts found in subparagraphs (2) and (4) of Section 201 (a), S 1214, were combined into subparagraph (2), Section 201 (a), HR 12533. These examples are presented to demonstrate that in this case grammatical changes were made without altering the meaning.

Section 201 (b), HR 12533/Section 201 (b) S 1214: Essentially the only similarity to Section 201 (b), between the two bills is in the establishment of a policy of recognition of tribal licensing as being equivalent to State licensing. The terminology in HR 12533 is more appropriate in that it expands the range of impact to include not only tribal licensing but also tribal "approval", and further specifies, "of foster or adoptive homes or institutions" (see Section 201 (b), HR 12533). Eliminated from this section in HR 12533 was the policy of "any Indian foster or adoptive home licensed or designated by a tribe (1) may accept Indian child placements by a non-tribal public or private agency and State funds in support of Indian children; and (2) shall be -ranted preference in the placement of an Indian child in accordance with Title I of this Act" (Section 201 (b), S 1214). The function of this policy was for the families to receive funds from the State, which would have been matched with federal funds from Title IV-B and XX of the Social Security Act. Section 201 (b), HR 12533, however, replaces this procedure with a far superior policy that is more in accordance with self-determination and will ensure that tribes get the funds (and with less bureaucratic red tape, hopefully). Section 201 (b), HR 12533, "permits tribes andorganizations to use such grant money for non-federal matching share with respect to Titles IV-B and XX of the Social Security Act or other similar federal programs".[152] This means the tribes can receive funding for programs authorized by this section without having to match them with their own funds, dollar for dollar. The sole problem now being, appropriation approval.

Section 201 (c), S 1214/Deleted from HR 12533: The purpose of this section was to further emphasize, and provide greater guidelines for, the authorization to utilize funds for the creation of family development centers. The elimination of this section could be at first considered of minimal impact, as general guidelines are provided in Section 201 (b), of both bills; however, as will be demonstrated below, the result of this elimination is serious, and therefore the contents will be presented here:

> (c) Every Indian tribe is authorized to construct, operate, and maintain a family development center which may contain, but shall not be limited to:
>
> (1) facilities for counseling Indian families which face disintegration and, where appropriate, for the treatment of individual family members;
>
> (2) facilities for the temporary custody of Indian children whose natural parent or parents or extended family member in whose care he has been left by his parent or parents or one who otherwise has custody according to tribal law or custom, are temporarily unable or unwilling to care for them or who otherwise are left temporarily without adequate adult supervision by an extended family member.[153]

This section would have not only established a program for federal support of this title, but also would have provided essential, wide reaching, guidelines and attitudes that, like Sections 101 (b), and 102 (d), S 1214, would have presented a forceful policy without local interpretation. In all of these points the statements could have demonstrated that Congress really does recognize cultural differences and the real need to provide federal legislation to render impetus for changes to the best. Through elimination of these standards, policies and guidelines, the Act takes on an impact appropriate of the purported intent, or the Act can serve as wallpaper.

Section 202, HR 12533/Section 202 (a) and (b), S 1214: The intent of this section, in both bills, is to authorize "the Secretary to make similar grants to Indian organizations for off-reservation programs".[154] The forcefulness of this section in HR 12533, however, is weakened by the elimination, or failure to include, the phrase, "off-reservation Indian family development programs, operated through grants with local Indian organizations" (Section 202 (b), S 1214). This statement positively identified who was to receive the funds, whereas the statement in HR 12533 is not so specific or forceful. Otherwise those comments made above of Section 201, both bills, holds true for this section also.

Section 201 (a), HR 12533/Section 203 (a), S 1214: The purpose of this section, in both bills, is to authorize the "Secretary of the Inteior and the Secretary of Health, Education, and Welfare, to enter into joint funding agreements with respect to Indian child and family service programs . . . ."[155] The major difference is that HR 12533 attached a restrictive proviso to the contents of this section: "that authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts" (Section 203 (a), HR 12533).

Section 203 (b), HR 12533/Section 203 (b), S 1214: Section 203 (b), S 1214, established special funding for this section, placing the first fiscal year appropriation at $26,000,000; whereas Section 203 (b), HR 12533, established funding in such a way that tribes will have to compete with other organizations for funds under the provisionsof the Act of November 2, 1921 (42 Stat 208), as amended. This procedure saves $26,000,000, but makes actual employment of this Title (and Act!) difficult, if not impossible, because of the funding requests having to compete with those programs for which the Act of November 2, 1921, was enacted.

Section 204, HR 12533/Not included in S 1214: The intent of this section is to provide that "solely with respect to Sections

202 and 203 of this Act, "Indian" shall have the meaning assigned to it in Section 4 (c) of the Indian Health Care Improvement Act of 1976 (90 State 1400, 1401)."[156] It is amazing that government must deal with numerous definitions of the term "Indian". It is alarmingly nauseating that Congress has the audacity, not to clarify the term into one meaning, but to instead confuse the problem more by incorporating two different meanings of the term, all within the same Act; this would seem to clearly express a "I don't give a damn" attitude at best; and perhaps even an expression to deliberately confuse the problem.

General Discussion of Title II: In the process from bill to Act, Title II was more dramatically altered than between S 1214 and HR 12533. In Section 201 (a), (2), PL 90-608, the term "the construction" was eliminated from the provisions concerning tribal facilities. This elimination takes the provisions and concepts of Title II the full gauntlet from the strong guidelines of Sections 201 (a) and 202 (b), S 1214, to the less definitive statements in Sections 201 (a) and 202, HR 12533, to the total elimination of the provision to construct such facilities; needless to say "operation and maintenance of something that does not exist is quite simple--and cheap! It would be an understatement that the elimination of this one-word term, "constuction", has totally altered the purpose and impact of--even the need for--Title II; such an abomination can only be a demonstration of ill faith, deceitful attitudes, the erroneous intent of the Act, and congressional ineptness!

If this were not enough demonstration of reversed intent, the audacity of the change in Section 201 (a) (7) is. First of all, the bill used the phrase "children are provided", but the Act has changed it to "children may be provided", a deliberate dillution of the provisions that changed it from mandatory to optional "services". But, this is not the end of it. The phrase "as Indian foster children" (Section 201 (a) (7)) of the bill now reads in the Act, "comparable to that for which they cwould be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs" (underlined emphasis added) (Section 201 (a) (7), PL 95-608). This in essence, is an outrageous legalization of the discriminatory procedures applied by states through their status quo, by Congress; it deliberately ties the States codes and practices back into the policy! The combined changes of Section 201 (a) (7), PL 95-608, then, makes it optional for adoptive families to receive "comparable" support in their caring for the INdian child's needs, based on the unique and cultural requirements they alledgedly profess for Indian child adoption. The same "gross negligence" by Congress was applied to Section 202 (1), PL 95-608, in that it is now optional to provide subsidy programs for off-Reservation programs, and that such subsidy will be done, "taking into account the appropriate State standards of support for maintenance and medical needs" (Section 202 (1), PL 95-608). These changes undeniably destroyed the purpose of Title II.

Title III: Recordkeeping, Information Availability, and Timetables

The purpose of Title III, as given in the title name, is fairly obvious, that is, to establish what records and information are to be kept, and timetables established by Congress to be met. Section 302 remained almost without change between the bills, but was practically eliminated in the Act itself. Analysis of sections, therefore will be made by comparing the two bills and the Act at the same time.

Section 301, HR 12533/Section 301, S 1214/Section 301, PL 95-608: The only change in this section between HR 12533 and PL 95-608, is in the reference used for the Freedom of Information Act, which is given in the last line of Section 301 (a). The reference cited in HR 12533 is "(80 Stat 381)", whereas the reference used in PL 95-608 is "(5 USC 552), as amended". Not having a copy of the Freedom of Information Act, comment of this change cannot be made.

Certain pharses were dropped, as usual from the proposal in S 1214, for this section, in writing HR 12533. Section 301 (a), S 1214, specifically directed, "the Secretary of the Interior is authorized and directed under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which are efected after the date of this Act . . ." (Section 301 (a), S 1214), whereas, HR 12533 weakly implies this; "any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order . . ." (Section 301 (a), HR 12533); no mention of required records at all. Furthermore, the statement in HR 12533 (and the Act) eliminates many of the required records by limiting them to "any State court" proceedings, and to only "Indian child adoptive proceedings, and all Indian children placements, other than adoptions, by State courts will have no records to pursue since the Act does no longer dictate this. Additionally, Section 301, S 1214, would have required that records of: "the names and addresses of . . . the extended family member, if any, in whose care he may have been left, . . . (and) the names and addresses of his (or hers) natural siblings, . . ." (Section 301 (a), S 1214); which would have provided for a greater number of references to seek one's cultural and tribal identity.

It should also be pointed out that provisions incorporated in Section 301, HR 12533, are contained, in rearranged fashion, in both Section 301 and Section 104, S 1214. Of greater implication, the provisions of Section 301, HR 12533 (and the Act), are in direct contradition with those provisions described in Section 107, HR 12533 (and the Act). Specifically, Section 107 directs that the Indian child may petition "the court which entered the final decree" to learn such information that will inform the child of his tribal affiliation, and "of the individual's biological parents" (Section 107, HR 12533/PL 95-608); whereas Section 301, HR 12533/PL 95-608, plainly specifies that if the biological parents request "anonymity, the Secretary shall certify" such to the tribe.

Section 301, HR 12533/Section 302, S 1214/Section 302, PL 95-608: The provisions of Sections 302 (a), S 1214, which specifically authorized the Secretary to make any rules and regulations to carry out the Act, was not included in HR 12533, and there are no visible implications in the exclusion of it. The provisions of Section 302 (b) and (c), S 1214, were exactly the same as Section 302 (a) and (b), HR 12533, with the exception of replacing the term "Indian interest agencies" with "Indian interest groups". The intent of these provisions in both bills was to establish specific steps and timetables for the implementation of the Act, and specifically called for direct input from tribes and all interested groups. The timetables as established in the bills would have called for final implementation after ten months.

Section 302, PL 95-608, however, eliminated all of these findings, stating that, "within 180 days after the enactment of this Act, the Secretary shall promelgate such rules and regulations as may be necessary to carry out the provisions of this Act". There is no longer any requirement to obtain or consider input from Indians, tribes, or interested groups; and there are no requirements to submit such rules and regulations to Congress for reviewal. There is only the gift of absolute power to the Secretary, and the pressure to produce in 180 days! It is no wonder that the meeting in March was not for input, but rather to inform those present of what had been done already; the Department was following its only guideline--produce in 180 days! In light of such understanding, the fact the meeting occurred at all, is attributable to the benevolence of the Secretary, and nothing more.

Title IV: Placement Prevention Study

Section 401 (a), HR 12533/Section 401 (a), S 1214/Section 401 (a), PL 95-608: .The intent of this section is clear and obvious, however, the deletion of a phrase from HR 12533 and PL 95-608, opens the question of sincerity of attitude once again. The statement from Section 401 (a), S 1214, below underscores the portion left out of the Act:

> (a) It is the sense of Congress that the absence of locally convenient day schools contribute to the break

> up of Indian families and denies Indian children the equal protection of the law.[157]

The interpretation made here, is that Congress could not own up to the fact that Indian children are not provided equal protection; the fact that the phrase was not included, however, does not alter the meaning completely. The statement in Section 401 (a), HR 12533, is identical to Section 401 (a), PL 95-608.

Section 401 (b), HR 12533/Section 401 (b), S 1214/Section 401 (b), S 1214: The contents and meaning of this section remained the same from S 1214 to PL 95-608, with two exceptions, one of which was that the time allocated was changed from one year in S 1214 to two years in HR 12533 and PL 95-608. The Section directs the Secretary to prepare and present a report on the "feasibility of providing Indian children with schools located near their homes", (Section 401 (b), S 1214/HR 12533/PL 95-608). The second difference is that the Secretary is now toconduct this, "in consultation with appropriate agencies in the Department of Health, Education, and Welfare . . ." (Section 401 (b), HR 12533/PL 95-608).

Section 402, HR 12533/Section 402, PL 95-608/not included in S 1214: This section was included to direct and ensure that the Secretary notifies appropriate State officials, sixty days prior to the enactment of the Act, of appropriate information concerning the Act, along with copies of the Act itself. Blatantly and irresponsibly missing is the direction for the Secretary to ensure that Indian tribes and organizations are supplied with similar materials and information--the ones most affected by the Act!

Section 403, HR 12533/Section 403, PL 95-608/not included in S 1214: The last section of the act is an important and decisive addition to the Public Law, if the interest is to maintain any vestiges of it at all. The provisions of this section allow that if any part of the Act is held invalid, the remaining provisions will not be affected, but will remain valid.

Concluding Statement

The preceding ciritical analysis was conducted in such a manner as well as attitude, that would allow perceptions of potential and real areas of trouble, especially if one were to try to interprete any provision(s) of the law in such a way as to precipitate a backlash against the Indian people and their natural rights. That is to say, if one were a "bigoted" prosecutor, or whatever, how could he despoil, negate, or otherwise use this Act against Indians? Many of the comments above, are therefore, perhaps, very slanted and/or pessimistic, yet this is not to concede the las is good, either. Many of the provisions of PL 95-608 are long overdue and quite necessary. Nor, is it the purpose here to dict-ate what is good for anyone, but rather to underscore problem areas.

One particularly important point is the the ambiguity of the Act is a two-way process, that it is subject to miltiple interpretations. Furthermore, it is important to keep in mind that, although federal laws cannot be overtly changed, provisions of rules and regulations can be written in detailed, more specific and demanding guidelines, and in such a fashion so as to both comply with, and yet covertly alter, by the presentation of definitions and details left out of the law. Additionally, aggressive demands for amendments of both the Secretary's rules and regulations, and the Act itself can be attempted. In writing tribal rules and regulations for implementation a review could be made of the deleted guidelines and provisions for such input. The assumption here is that the law is fact, but implementation is subject to change.

The conclusion of this discussion, however, is that the Act is both inherently and potentially "trouble". It has hopefully been demonstrated that every apportunity to miscontrue the provisions in such a manner so as to lessen the credence of the Act was enjoined; that the purpose, intent, scope, and impact of the Act is not what it is purported to be; that the Act provides no guidelines of recourse for those not abiding by it; and that the attitude of Congress, in respect to PL 95-608, is not to protect the best interest of the Indian child, nor create unique standards and procedures based on cultural differences, but rather it is their attitude to disjunctly placate the Indian people, along with their congressional obligations to the Indians, through enactment of PL 95-608.

Implementation needs to provide insurances that those standards, values, concepts, and proceedings that are necessary, but not dealt with in this Act, are adequately dealt with; that is, the "attitudes" and interest of the diverse Indian cultures must be clearly formalized and included in implementation.

Part Three: Analysis of Dissenting Views.

The discussion of the historical events of Indian child welfare, in Part One of this paper, alluded to the various sub-committee hearings, and reports submitted to and by said committees, which were utilized throughout the preparation of both bills, S 1214 and HR 12533. Portions of both the House Report and the Senate Report contained various portions of these committee's correspondence and reports; the House Report specifically contained a section, "Dissenting Views"[153] (see Appendix B). The "Dissenting Views" report was prepared by Representative Ron Marlenee, but also contains excertpts and letters of disenting views from others. Assistant Secretary Forest Gerard also submitted two letters of dissention (Appendix) allegedly on behalf of the Secretary of the Interior, and the Bureau of Indian Affairs. These two documents, being the only two immediately available at this time, will be the subject of analysis in this part of this paper.

Assistant Secretary Forrest Gerard is currently the head of the Bureau of Indian Affairs, and whom, one would assume, is interested in representing the best interests, desires, and needs of the American Indian to the federal government, through his delegated responsibility of this position. It would further seem reasonable to assume that the head of the Bureau of Indian Affairs, would, by authority of his responsibility, aggressively pursue a specific, highly appropriate, beneficial, and comprehensive legislation to protect the rights and welfare of Indian children; and that he would further attempt to have any such legislation created to encompass and affect the greatest number of Indian people possible--based on the best interests of the people. It is indeed such assumptions that the United States Congress makes when it reviewed recommendations and/or any other communications with the Assistant Secretary, for the Bureau of Indian Affairs; and it is with such understanding that the Congressional Committee reviewed Assistant Secretary Forrest Gerard's letters--that they represent the attitudes and positions of the Bureau of Indian Affairs, and consequently, the assumption continues to be made that such views are applicable for the Indians themselves. Without such assumptions or understandings the United States government would become self-consuming and baseless.

It is through a complete understanding of the basic assumptions that are made by Congress in respect to interactions with the Assistant Secretary, that a comprehension of the gross impact that the letters submitted by Assistant Secretary Gerard have had, and continue to have, on the Indian Child Welfare Act. It will become clear through analysis that the letters submitted by Assistant Secretary Gerard indeed represent a dissenting view, and in all probability created confusion for the Committees in that the letters are antagonistic in its views to other reports and findings submitted. Veritaby, the integrity of the Secretary comes across as nonexistant, one of insensitiveness to his position and responsibilities almost treasonous--a point that is unfortunatley being raised by many people, but to be sure, not by all.

On June 6, 1978, Assistant Secretary Gerard, for the Secretary of the Interior, drafted his first letter to Represe-ntative Morris Udall, Cahir, House Committee on Interior and Insular Affairs, opening it with, "this Department would like to make its views known on HR 12533 . . . and urges the Committee to make the recommended changes . . ."[159] He goes on to state, "if HR 12533 is amended or detailed herein . . . we would recommend that the bill be enacted."[158] This exemplifies that the views expressed in the letter are the "official views, and that without the recommended changes the Department cannot support or properly implement, the Act. (One could readily observe that without the changes, the

Department lastly exercise it's awesome power to ensure failure).

The Secretary elucidates his interpretation of Title I, HR 12533, stating that it:

> . . . would establish nationwide procedures for the handling of Indian child placements. The bill would vest in tribal courts the already acknowledged right to exclusive jurisdiction over Indian child placements with their reservations. It would also provide for transfer of such proceedings from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects.
>
> Requirements dealing with notice to tribes and parents an consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of mny Indian parents who have lost their children.
>
> Title I would also impose on State courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon finding of indigency by the court.
>
> State courts would also be required, under the provisions of HR 12533, to apply preference standards set forth in Section 105 in the placing of an Indian child. The preference would strengthen the choices of the Indian child staying within the Indian community and growing up with a consistent set of cultural values[160] (underlined emphasis added).

Most obvious in this official statement is that the Department and the Secretary are ignoring much of Title I, that they hold an attitude that there is no need for the law, and that the provisions are questionable. The attitude of the bill's inappropriatness is garnered from the terminology in the first paragraph (underlined), particularly in the terms "would vest" and "already acknowledge". Terminology in the third paragraph also demonstrates this attitude by saying that the Title "would also impose"; and in the fourth paragraph the attitude is again demeaningly expressed by the phrase, "State courts would also be required", and the term "chances" (also underlined above). Truely, the Secretary's interpretation needs to imply that the policies addressed are not necessary, that the Title is imposing on State's rights, rather than protecting the Indian rights, this interpretation is reiterated in the Secretary's dissenting statements on specific "problem areas" of the bill.

The Secretary first expressed the Department's attitude on the term "placement", as defined in Section 4 (a):

> We believe that the protection provided by this Act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding[161] (underlined emphasis added).

The implication of this statement is that the Secretary wishes to exclude certain proceedings--custody pursuant to divorce and delinquency--from the ramifications of the Act; or indirectly he is implying that cultural differences need not affect certain proceedings.

The Secretary addresses several "problems" with Section 101 (a), expressing the belief, ". . . that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody"[162] (underlined emphasis added). The Secretary is thus denying the rights of Indian children--including tribal members--residing off reservations and denounces that they should be extended the protection of this Act. Next, he presents a real potential problem area, in that "the bill does not address the situation where two parental views are addressed",[163] which was not addressed in the Act or otherwise. One simply must question the integrity of the Secretary in his comments of PL 83-280 reservations, when he states: "We believe that reservations located in states subject to PL 83-280 should be specifically excluded from section 101 (a) . . .";[164] it should be noted that the Act was changed in this respect.

In discussing Section 101 (b) the Secretary makes an extremely noxious objection and recommendation that the section should ". . . be amended to prohibit clearly the transfer of a child placement of 12 objects to the transfer".[165] This is clearly a denial of protection of the Indian child's rights to cultural integrity, and an intimidating statement by the Department; and that it can easily be inferred that the Department believes that Indian child cases should remain in the State courts--e.g., status quo and assimilation! Fortunately, the Act, which reads ". . . absent objection by either parent . . .",[166] is ambiguous enough so that an impartial judge can determine the Indian child's best interests. Granted, this policy is not the best, but it is decidedly better than prohibiting the transfer of cases to tribal courts.

The discussion of Section 102 (b) is perhaps the most prolific example of the Secretary's gross negligence on the knowledge and functions of his position. The section addresses the serious need for court-appointed counsel, which is vividly reflected by Secretary Gerard:

> We are opposed to the enactment of this section, we do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.[167]

In retrospect of the discussion in Part One of this paper, one must sorely question Secretary Gerard's knowledge of Indian Affairs, as the need is verifiably there (indeed it would seem Congress would have challenged Secretary Gerard, to determine his suitability as the Assistant Secretary for the Bureau of Indian Affairs, after such comments!).

Secretary Gerard continues to deny the Indian child's right to cultural identity in his discussion of Section 102 (c), where he states that the "provision conflicts with the Federal Child Abuse and Neglect Treatment Act, PL 93-247 . . . that such a broad opening of records would lead to less reporting . . . (and) recommend that the Indian Child Welfare Act conform with the provisions of PL 93-247"[168] (underlined emphasis added). Secretary Gerard is essentially validating the status quo; that is, if he sincerely had the best interest of the Indian child in mind he would have recommended that PL 93-247 be amended to accomodate the provisions of this section in HR 12533, rather than recommending conforming to PL 93-247. His statement is additionally refuting, indirectly, the purpose and policy of the Act.

Secretary Gerard's discussion of Section 102 (e), HR 12533 and Section 101 (b), S 1214, seems to be an interesting example of an apparently misconstrued understanding of the text's language--which also indirectly supports the over-ambitious thesis of this paper--and the intent of the section. Mr. Gerard begins:

> Section 102 (c) of HR 12533 would require the state court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe the burden of proof is too high. We would support the language found in Section 101 (b) of the Senate-passed S 1214, which would impose a burden of clear and convincing evidence and would set down certain social conditions which could not be considered by the court as "prima facie" evidence of neglect or abuse[169] (underlined emphasis added).

The terminology, "clear and convincing", supported by the Secretary is interpreted in this instance, essentially the same in both bills. This argument on Social Standards is essentially the same, though weaker and shorter, as that presented under the analysis of Section 102 (e), HR 12533, in Part II of this paper. Yet, Mr. Gerard feels the burden of proof is too high! It seems he has failed to read not only this Act, but also the United States Constitution and the Mirander Act, both of which directly reflect that the burden is upon the court to ensure that their decision--no matter what the issues--on the case clearly represents the best interest of the people, beyond a reasonable doubt; it is a basic United State right of everyone that Mr. Gerard is requesting to be denied to Indian children and their families.

In discussing the issue of failed placements under the provisions of Section 106, HR 12533, the Secretary takes a stand against considering such new placements as falling under the Act, stating, "we see no reason for requiring a full proceeding every time a child is moved from one form of foster care to another".[170] It is granted that such actions may not occur for non-Indian proceedings, but this does not mean such provisions are not appropriate, in either case, and just because one does not apply such criteria does not mean that failure to do so is the correct procedure. Again the need is to help people through their best interests and needs, not just to help people because it keeps the bureaucracy alive.

The Secretary's discussion of Section 107 HR 12533, brings out some interesting points. Most important is the fact that the Secretary failed to integrate the provisions of Section 107, HR

12533, with those of Section 301 (b), both sections requiring the court and/or the Secretary, respectively, to inform the Indian child of his tribal identity upon request. Such action is seemingly a balance of power check on the authority of the Secretary of the Interior, yet Gerard desired the elimination of Section 107, HR 12533, because, "we believe that rather than apply to the court for such information, the individual should apply to the Secretary of the Interior . . . the Secretary would be more likely than the State court to have the information needed to protect any rights of the individual . . ."[171] Mr. Gerard forgets the courts too keep records, and indeed are the ones sending the records to the Secretary. What Section 107 does is to make access more probable and feasible for the child, because the court will probably be near his home, and it denies the Bureau of Indian Affairs a segment of its parental authority.

Despite the audacity of Secretary Gerard's attitudes and beliefs expressed on the first part of the bill, it still confronts one as totally incorrigible and paralytical when he states, "we believe that many of the authorities granted by Title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of Title II."[172] Without citing which laws he is referring to, Mr. Gerard continues to delineate that which "we find especially objectionable in Title II . . .", and specifies the areas: (1) "unlimited subsidy program for Indian adoptive children"; (2) "grants to establish and operate off reservation . . . programs"; (3) "authorization of $26,000,000"; (4) that "every Indian tribe" falls under the provisions of Section

201 (c); and (5) funds that are appropriated could be used for "non-federal matching share . . .".[173]

Secretary Gerard's only positive comment on Title II was in reference to Section 201 (b), HR 12533, which provides "that licensing or approval by an Indian tribe should be deemed equivalent to that done by a state (and) should remain in the bill under Title I as a separate section."[174] The Department's adamant dissension regarding Title II is reflected as undivided refutation of the Act itself; certainly, what good is the Act without money and authorization to complete intended goals. The statements objectively demonstrate the Departments attitude about off-reservation and smaller reservation Indians--that is, they do not give a damn about them. Moreover, in re-examination of statements discussed above on how the Department could not support (thus implement adequately) the bill without their recommended changes, and the fact that they advised deletion of Title II, which was thankfully not done, that the Department will not conduct its responsibilities in a proper fashion, in regards to implementing PL 95-608, is perceptible.

The Secretary's objection to Section 302 (c) is an excellent example of a bureaucratic cry baby tempestuously reacting to having to do something which could be eaither "burdensome"[175] or may potentially expose some ineptness in the Department. The Congressional intent was simple, they did not want to allow the Department to concoct revisions, or amendments, without their reviewing them. Devestatingly, the Secretary's recommendation was taken to heart, as Section 302 was completely altered to the point of near elimination--he must be very proud!

On September 18, 1978, Assistant Secretary Gerard again sent a letter of dissent to the House of Representatives--this time to the Speaker. The major objections in this letter are in reference to Title II and Section 102 (b). In reference to Title II Mr. Gerard states:

> We continue to urge that Title II of the bill, Indian Child and Family Programs, be deleted. Many of the alternatives granted by Title II are troublesome and are unnecessary because they duplicate authorities in present law [176] (underlined emphasis added).

The phrase "troublesome and are unnecessary" seems to be the key to the Department's attitude, position, and current dissention to the bill--although one must give credit to the Secretary's true grit to openly state such a view as this. The assumption here is that it will require some work--thus troublesome--and, that it is unnecessary, because there is no problem, as the Department sees it. Clearly it was too much trouble for the Secretary to restate his specific arguments because he redundantly, word for word, restated them in this letter (which also contained a copy of the June 6, 1978, letter!).

It also urged that Section 1026, HR 12533, which provides for legal counsel, be deleted because ". . . there has not been a significant demonstration of need . . .", and that it would be a "financial burden".[177] Undoubtedly without the funding of Title II, this section--as well as the Act itself--wil be a "financial burden". And as long as the Secretary's vision fails him, he will continue to see no need for this Act. The Department's procrastinating views are profoundly exposed in their recommendation that ". . . the bill should not take effect until one year after the date of enactment."[178] Secretary Gerard then leaves no doubt in the minds of anyone as to his, and the Departments specific position on the bill and thus the Act:

> We strongly urge you and the members of the House to delete Title II of HR 12533 and Section 102 (b). Only with these changes would we be able to support the bill[183] (underlined emphasis added).

This open statement leaves no doubt that the Act will not be supported by the Department, because the changes were not wholely adopted, and the assumption therefore is that they will attempt to subterfuge the Act--either overtly or covertly. It is a disgusting himiliation to have to accept such negligence and deriliction of performance from the Assistant Secretary and Department of the Interior--because it is but another cog in the cycle of disgusting perpetuation of demise.

The other source of dissenting views is the House of Representative's Report No. 1386, on HR 12533, which includes a section on such, by Congressman Ron Marlenee, of Montana. It should be noted from the start that Mr. Marlenee did retract many of his audacious statements. The benefit of looking at this report, however, is still relevant for two reasons: (1) It containts documents Mr. Marlenee received from other dissentors; and (2) It demonstrates the attitudes behind the dissentions towards the Act regardless of the facts, which in turn highlights/focuses on those potential areas of trouble that will undoubtedly be utilized by those people who strongly oppose the Act. It is of local interest in this paper that it was Mr. Marlenee of Montana that submitted the dissenting view, ". . . because I was the only Member expressing grave concerns about many of the bills provisions."[184] Mr. Marlenee further explains this reasoning:

> Among these numerous issues are the cost to the States to enforce the provisions, new layers of programs for Indian tribes, and basic constitutional issues like State-Indian jurisdiction.[135]

Mr. Marlenee goes on to urge rejection of the bill, allegedly for one reason, to give more time for the "public" to consider it; the question of not sufficiently discussing issues surrounding the Act will indeed be seen as the primary point of dissent, but for purposes of this paper the specifics will be focused upon because of their potential future problems in implementation of the Act.

The first example Mr. Marlenee cites, is a letter from the Justice Department (endorsed by Assistant Attorney General Patricia Wald), dated May 23, 1978:

> In that letter, discussing the House version, Ms. Wald raised some serious questions: (1) Whether the bill under White vs. Califano might hold the federal government responsible for the financial support of Indians even though no money had been appropriated, (2) whether the bill might displace any existing State court jurisdiction on Indian child welfare matters in Public Law 280 States even where tribal courts did not exist, and (3) whether the bill might have the effect of reestablishing diminished or disestablished boundries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements.
>
> In regard to (3) she wrote:
>
> > "We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate."
>
> To my knowledge this issue was never discussed.[186]

These points, particularly (1), are well taken, and provide a focal point for legal pursuit of the arbitrarily eliminated federal funds to support the Act. Although the emphasis and reasons for Mr. Marlenee's (and other's) points of objection may be different, they do in fact substantiate the weakness and ambiguousness of the

Act, as previously substantiated.

Mr. Marlenee next cited the letters, discussed above, by Assistant Secretary Forest Gerard, pointing out that Mr. Gerard had numerous "concerns" that were not properly addressed; Mr. Gerard's unethical definace being clearly manipulated by Mr. Marlenee in another catch-22 syndrome to support his dissenting position. Mr. Marlenee goes on to state, "It shall be noted that many of the concerns expressed by Mr. Gerard, who is a strong advocate of Indian(s), were not, in my opinion, properly addressed"[187] (underlined emphasis added). Obviously, if Mr. Marlenee considers Mr. Gerard's dissenting views as "pro-Indian"--demonstratedly refuted above--then his dissentions and opinons may be considered far more dangerous concerning the interest of the Indians.

Mr. Marlenee next discusses "objections raised by officials in my State of Montana";[188] first addressing a letter from Governor Thomas Judge, dated June 20, 1978:

> It has come to my attention that you have scheduled the markup on HR 12533, the Indian Child Welfare Act. This legislation identifies some real problems and we are in agreement with the intent of the bill. However, there may be some ill effect. I urge you to hold hearings on the bill to allow us time to present our concerns. I am sure you want to ensure that problems are solved without creating new ones at the same time.[189]

Mr. Marlenee then presents another letter, also date June 20, 1978, from the State of Montana Attorney for Social and Rehabilitative Services, which attempts to address some specific "problems" with the Act:

> Constitutional questions aside, several problems of implementation are readily apparent from reading the bill. For example, although the bill requires State courts to give preference to certain homes in placing Indian children based on evidence in the record, the bill does not provide any mechanism requiring the family

> or the tribe to present such evidence. Nor does it create a means by which already overburdened State courts can discover such evidence on their own.[190]

This is clearly an example of "playing dumb" when all else fails. The finger, or rather the burden of proof, is being placed upon the party that has failed to provide justice, and now they are squirming at the thought of having to do such. Mr. Richard Weber, the Montana attorney writing Mr. Marlenee, continues:

> But even more disturbing to the Montana Department of Social and Rehabilitation Services is the bill's lack of clarity on the issue of payment for social services for Indian children and families. Section 201 (b) of Title II of the bill states: ". . . the provision or possibility of assistance under this act shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federall assisted program."
>
> This language suggests a strong possibility that a State whose courts had not exercised jurisdiction over an Indian child or family would be called upon to fund at least part of the social services delivered to that Indian child or family. This office believes that all cases in which an Indian tribal court exercises jurisdiction the financial burden for providing social services should fall exclusively upon the tribe and the federal government.[191]

Plainly, Mr. Weber's fears on this issue are based on possible exposure of the States negligent use and appropriation of Title IV-B and XX funds. In Part I of this paper it was demonstrated how the State utilized the Indian population to secure funds, then failed to use them correctly. The intent of Section 201 (b), HR 12533, is to allow funds allocated for the purposes of the Act (if allocated!) to be used as matching funds to also receive Title IV-B and XX funds, which needless to say would require the State of Montana to relinquish such funds; but the state would not be paying out of its pocket, merely appropriately using funds obtained from the federal government under Title IV-B and XX, of the Social Security Act. Mr. Weber continues:

> In addition, it appears that tribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts and, hence, the State agencies administering Title IV and Title XX will have no choice but to accept those cases. Such a situation is clearly inequitable.[192]

The assumption Mr. Weber makes in this dissenting point of view is that Indian tribes and courts will make the same cold, callous, money hungry, nonconscious decision that the non-Indian governments and courts would make; which is, in this case, that the children are not the issue, but rather money and work--truly a perfect example of arrogant, non-understanding, of the Indian's values, particularly within his own State.

Another assumption, or perhaps point of fact to heed, is that the State of Montana will not release Title IV-B and XX funds to the tribes to help cover the costs of proceedings, which, in Mr. Weber's opinion, would result in tribes waiving jurisdiction to the State because they will have the funds and must "accept those cases". What Mr. Weber fails to realize is that tribes want the jurisdiction to protect Indian children in spite of costs, and that if the State of Montana abides by the provisions of Section 201(b), relinquishing matching funds, the problem he is so "disturbed" about will not even have the potential to occur. Of course, the point behind Mr. Weber's argument was to remind everyone of the "Proposition 13 attitude" and, thus a need to delay voting on the bill, or to defeat the bill altogether.

Congressman Marlenee then notes that other organizations have presented arguments against the bill, as well as raised serious questions, that "remain outstanding".[192] Among such organizations Mr. Marlenee mentions the National Conference of Catholic Charities, and the National Council of State Public Welfare Administrators. In connection with the latter, Mr. Marlenee had this to say:

> But perhaps one of the strongest arguments for defeating the bill came in a letter of June 12, 1978, from the National Council of State Public Welfare Administrators. The concluding paragraph of that letter said:
>
>> The National Council of State Public Welfare Administrators believes that HR 12533 should not be enacted prior to a much broader consultation than has thus far been achieved by the responsible congressional committees. Enclosed is a resolution approved by representatives of 38 States and two jurisdictions present at the council meetin on June 7-8, 1978 in support of this recommendation.[193]

It would seem that Mr. Marlenee is appealing to some high "authority", almost as a last ditch effort to defeat the bill. The Council's main argument is, again, inadequate time to express their opinions (or perhaps their anger at not getting their way!) and an opportunity to "clarify" issues. Mr. Marlenee's referal to this authority, however, is compatable to a Southern racist appealing to the authority of the KKK, that is, due to their self-assumed inherent authority, they are presenting as factual evidence statements by the "guilty" party. The bureaucracy of the welfare system stands to loose much power through the Act, and are quite "naturally fighting it".

In conclusion two points stand out in the forefront of the dissenting views: (1) that the majority of the dissention came from political leaders in the State of Montana; and (2) that the emphasis behind defeating the bill was that more time was needed to discuss the issues involved. The unmentioned, but most probable outcome of either sending the bill back to committee or defeating it would be the death of any possible such enactments. Indeed, as described in Part One of this paper, the bill was several years in coming, and, as demonstrated in Part Two, was a fairly poor compromise of the original intent as written up in S 1214. Such compromises had to be made in order to get it on the floor at all, and clearly any further changes would have altered the bill(s) to a state of total uselessness.

Part Four: Analysis of the Purposed Regulations for Implementation PL 95-608, the Indian Child Welfare Act

Section 302, PL 95-608, stipulates that ". . . the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act".[194] As defined "Secretary" means the Secretary of the Interior (PL 95-608, Section 4 (11)), but indirectly refers to the bureaucratic conglomeration of the Department of the Inteiror, the Bureau of Indian Affairs, which ultimately means some government employee detailed to writing the regulations. Sequentially this means that some eight-to-four o'clock "qualified" governmental employee has (or had) the absolute power of interpreting the law in whatever methodology suits (or suited) his pleasure; which shockingly provides for incredible latitudinal powers and choices from the negative to the positive spectrums.

The more perceptible course of action would be for the Secretary to designate a team, rather than an individual, who would, through the authority of the Secretary, forward, by certified mail, copies of the Act, and all relevant materials, along with an analysis of the good and bad points (similar to this report), to all Indian tribes and organizations as well as all other bodies affected by the Act (e.g., State governments). Such correspondences would further request reply by endorsement's (RBI's) with appropriate recommendations for regulations and implementation schemes, so that the team could consolidate ideas, attitudes and proposals into a draft copy. Furthermore, the correspondence would establish a firm date (after coordinating for an appropriately convenient date) for a conference to draw up a complete draft. Such a draft would be submitted to the Congressional committees and tribal/organizational, councils/committees, for recommendations. After any revisions the draft for the regulations would be published in the Federal Register for general comments. If no major problems occur then the draft could be published as part of the Codes of Federal Regulations.

Such a process is indeed the normal method pursued in codifying laws and is essentially the process delineated in the guidelines that were proposed under Title III of both Bills (S 1214/HR 12533), but incredulously deleted from the Act. The revised provisions of Section 302 as incorporated into the Act and enhanced by the Bureau of Indian Affair's adament dissention towards the Act, provided ample justification for the Bureau of Indian Affairs to promulgate the rules and regulations in a slipshod fashion--in order to meet the deadline requirements of said Section 302--that totally fails to adequately, least of all appropriately, define and address the provisions of the Act through the rules and regulations as have been proposed. This process, as well as the product, while consistantly stereotypic with other Bureau of Indian Affairs output, is somehow producing even less than normal, as will be shown below; the process being abortive and minimal, the product dwelling on nothing more than the objections proclaimed by the Bureau of Indian Affairs previous to the enactment of PL 95-608.

In retrospect, however, of this negative attitude held by the Bureau of Indian Affairs twoards the Act, along with the ludicrous provisions of Section 302, normal Bureau of Indian Affairs inept procedures, and the overall prevailing attitude by interest groups--such as the Mormon Church--it is fairly assurable that the codification process was destined to disaster before it began; as was the case. Embarrassingly, one must theorize that the effort to make the Act totally useless was more on the Bureau of Indian Affair's agenda, than to implement policies to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families . . . ."[195]

If one was interested in the process pursued by the Bureau of Indian Affairs in codification of PL 95-608, they would of necessity had to have been at the right place, at the right time, and with a stacked deck. Outside of a belated publication in the Code of Federal Regulations (CFR), nothing published on the Act can be readily found (assuming the CFR was readily available!). The fortunate few who heard about the conference of March, 1979, concerning the draft for the proposed regulations may have come in contact with the farcical 24-page proposal being seditiously tendered by the Bureau of Indian Affairs. Coincidentally, very few interested parties were availed of either the conference or the draft--especially prior to the conference. For most, the first available document was the published draft proposal in the Federal Register, dated April 23, 1979, but generally not available until early June due to slow distribution. For too many, the following statement was unhappily their first notice of the previous conference:

> These proposed regulations incorporate viewpoints expressed during public hearings conducted during March, 1979. Additional and supplemental viewpoints are now solicited prior to publication of the regulations in final form.[196]

As if this were not nauseating enough, one is further informed that, "Comments must be received on or before May 23, 1979."[197] Simply stated, for the public--whom the agency is alledgedly serving--opportunity to express an opinion was non-existant; unless one spent his life in Washington, DC, following the governments every step. The whole derogatory process is a shame to the democratic system!

The proposed rules in the Federal Register contained another deeafeningly despondent note, that catocysmically challenges the hopeful merits and intentions of the Indian Child Welfare Act:

> The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.[198]

This simple statement succulently focalizes upon not only the arbitrary powers of the Bureau of Indian Affairs to do as it damn well pleases (Who are they to determine significance!), but further substantiates the Bureau of Indian Affair's total lack of interest to perform its regulatory mission and/or functions. This statement, in spite of its focade, damns the Indian Child Welfare Act from being the formidable legislation that it was originally intended to be, and more importantly must be.

Essentially the proposed rules deal with those areas of PL 95-608 that could be labled most controversial to interpretation, and are, most assuredly, inclussive of these aspects of the Act "most disagreeable" to the Bureau of Indian Affairs and the Department of the Interior; in short the proposed rules fail completely, to properly address and codify the Indian Child Welfare Act into regulations. The rules as proposed would add to the CFR, Volume 25, a new Part 13: "Tribal Resumption of Jurisdiction Over Child Custody Proceedings"; and a new Part 23: "Indian Child Welfare Act".[199]

In addition to publishing the proposed rules for PL 95-608, the Bureau of Indian Affairs also published "Notices" or "Recommended Guildelines for State Courts--Indian Child Custody Proceedings",[200] dated April 17, 1979. This "Notice" is primarily the Bureau of Indian Affair's comments of interpretion of several sections of PL 95-608 that they blatantly ignored in the proposed rules, for which they felt "compelled" to expound on as guidelines, "In order to facilitate the fullest possible measures of implementation of the Indian Child Welfare Act of 1978."[201] Perhaps if the Department had incorporated these "guidelines" the proposed rules would be more significant, but they ruefully defend themselves with the technical alibi that, "The Act does not delegate to the Interior Department the authority to mandate procedures for state or tribal courts."[202] If this is really so, why then does Volume 25 of the Codes of Federal Regulations exist? And what are the differences between the "guidelines" and "rules", that the "rules" do not mandate?--indeed this lay writer cannot perceive it! (It should also be reiterated that S 1214 contained a similar text that would have addressed these very problems under the pretense of a law instead of a "Notice".)[203]

The Code of Federal Regulations is topically and numerically catalogued, and 25 CFR (Volume 25, of the Codes) deals with regulations on, Indians, which is indexed into four chapters: (I) Bureau of Indian Affairs, Department of the Interior; (II) Indian Arts and Crafts Board, Department of the Interior; (III) Indian Claims Commission, and (IV) Navajo and Hopi Indian Relocation Commission. Chapter I comprises the bulk of the volume, and is further outlined alphabetically and numerically into Subchapters and Parts, respectively (the numerical parts do not correspond with the subchapters, but rather run sequentially). The assumption here will be that, because of PL 95-608 was determined not to be a significant Act, the Act has been detrimentally added to other Subchapters. As such, the proposed rules which are additions for Subchapter B: "Law and Order", and Subchapter D: "Social Welfare", will be separately analyzed. It should be noted, however, that if properly treated it is perceived that PL 95-608 would have promulgated a new Subchapter along with its respective parts.

25 CFR Part 13: Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

As the title for Part 13 indicates, it deals exclusively, although not thoroughly, with Section 108, PL 95-608. A review of the centent for the sections of this proposed rule, quickly demonstrates the failure to address at all the critical issues of PL 95-608: Sections 108 (b), (2); and 158 (d). The contents read: "13.1 Purpose; 13.11 Contents of reassumption petition; 13.12 Criteria for approval of reassumption petitions; 13.13 Technical assistance prior to petitioning; 13.14 Secretarial review procedures; 13.15

Finality of decision by the Secretary; 13.16 Technical assistance after disapproval."[204] Clearly, the intended impact of such rules is to make it nearly impossible to get approval, what with such ambiguous or "catch-22" criteria as established in Subsection 13.12.

Section 13.12 (b) stipulates: "The constitution or other governing document of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters;"[205] This is fine, but what if the Secretary doesn't approve a change to said document? Furthermore, Section 13.12 (e) requires: "Child care services ufficient to meet the needs of any child the tribal judicial system finds must be removed from parental custody are available."[206] This is one hell of a stipulation to make when the Act's funds were eliminated due to pressure on Congress by groups like the Bureau of Indian Affairs, who said the funds were not needed--no wonder they are not needed, because the need is now illegal! Who says the Department cannot mandate one's very existence?!

In a typical bureaucratic tactic, Section 13.12 (f) was beligerently included as a criterian: "The tribe or tribes have established a procedure for clearly identifying who is a member of the tribe or il eligible for membership."207 This was again one of the Bureau of Indian Affair's dissenting points about the Act; the Bureau din't get Congress to meet their wishes, so they did it themselves.

Under the subpart discussing the purpose, the rules alluded to the very toxic situation of "disputes concerning whether certain federal acts have subjected Indian child custody proceedings to state jurisdiction", to which the Bureau of Indian Affair's rules purport that they will ". . . permit such tribes to secure unquestioned jurisdiction over Indian child custody matters without relinquishing their claim that no federal statute had ever deprived them of that jurisdiction."[208] Sounds good on paper, but has the author of this statement ever been to Montana? Where are the guidelines to detail the process? Where are the teeth to support such rules, or what is the statutory or judicial precident for establishing such significance--indeed it will be recalled that ". . . this document is not a significant rule . . . ."[209] No part of any section can be read to even imply such procedural protection of litigated, or even acknowledge, rights.

The critical issues of PL 95-608, Sections 108 (b) (2), and 108 (d), are not embraced in the promulgated rules, despite the illusive appearance of the rules completeness; but nearly one-sixth of the promulgated rules for PL 95-608 cover the implementation of only the objectable issues of this section (PL 95-608, Section 108). This failure to approrpiately address the issues leaves an absence for the possibility of partial retrocession, to exercise jurisdiction in Indian child welfare issues, in a completely opaque vacuum: (Rather than a well-defined opportunity as authorized under PL 95-608, Section 108 (b) (2).) Similarly, the fact that the Act is not retroactive (Pl 95-608, Section 108 (d)), is equally neglected; perhaps this is because Section 109 is also dilegently left out of the proposed rules, which should have additionally addressed the possible process of joint agreements between the States and Indian tribes for transference of cases, on a case-by-case basis, for tribal jurisdiction.[210]

Essentially then, Part 13 of the proposed rules, for codification of jurisdiction reassujption by tribes, can be viewed as nothing more tha a gambit of readblocks to achievement of such. The rules fail in every measure to address the actual intentions of the Indian Child Welfare Act, but have established bureaucratic paperwork drills that challenges every Indian tribe's guest to resume jurisdiction in this most crucial area, Indian child welfare. There are no procedural guidelines for negotiating with state officials for orderly transferral of jurisdiction, nor how the resolve disputes, or safeguard tribal rights, concerning such jurisdictional transfer. There are no guidelines pursuant to redistribution of Title XX funds from States to Indian tribes and organizations. The list could go on, but the point should be clear, and that is that the proposed rules in no way address the situational needs at hand; but rather they are nothing more than an impossible list of Don'ts, the summation of which, is literacy brilliance in negating itself through its own words.

25 CFR Part 23: Indian Child Welfare Act

The proposed rules to implement the Indian Child Welfare Act, in general, makes the proposed rules to implement tribal reassumption of jurisdiction over Child Custody Proceedings--as discussed above--read like a diligently brilliant masterpiece of interpretations. In short, these rules do not address implementation, but rather funding limitations, and harbingers of such along with methodological lists of records--which again spells out clearly those things predictably designed to defeat the intent of the law. Part 23 is broken down into eight subparts, A through H, with

Subpart A (Purpose, Definitions, and Policy) addresses increments of Sections 3 and 4, PL 95-608; Subpart B (Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel) expound upon approximately two sentences of the six paragraphs contained in Section 102, PL 95-608; Subpart C (Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs) volumnously directs and extrapolates the contents of Sections 201 (a) and 202, PL 95-608; Subpart D (General Grant Requirements), is gleaned from some source unknown to this author, unless they are gross interpretations of Section 201 (b), PL 95-608; Subpart E (Grant Revision, Cancellation, or Assumption) is very loosly related to both Subpart C and Sections 201 (a) and 202, PL 95-608; Subpart F (Hearing and Appeals) and Subpart G (Administrative Requirements) are apparent extensions of Subpart C, also; and Subpart H (Administrative Provisions) meanders over the requirements dictated in Section 301, PL 95-608.

Section 23.1, of the proposed rules willfully states the purpose of these rules:

> The purpose of the regulations in this Part is to govern the provision of administration and funding of the Indian Child Welfare Act of 1978 (Public Law 95-608, 92 Stat 3069, 25 USC 1901-1952).[211]

That this is what they do is obvious; what they fail to do is not so clear, but rather poignantly manifested by its unjustifiable absence. Noticeably the proposed rules, as given in the Federal Register (Volume 44, No. 79; April 23, 1979), have brazenly, if not consistantly and with mailice, neglected to promulgate three-fifths of the sections of PL 95-608, the Indian Child Welfare Act of 1978.

As presented in the purpose above, the proposed rules are to cover only 25 USC 1901-1952, and therefore openly deny codification of 25 USC 1961-1963 (Title IV; Sections 401, 402 and 403, PL 95-608). Perhaps most crucial in the long run, although all sections are truly necessary, is Section 403, PL 95-608 (25 USC 1963) which states: "If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.[212] Although this statement singularly may seem inconsequential in this age of trivial mindedness in the judicial system failure in elaboration and codification of this provision is momentous. Conclusively, its absence means if any part of PL 95-608 is found through litigation, or otherwise, to be illegal, the the remainder of the Act can also be invalidated.

Perhaps more dubious, in reflection of the fact that the "Purpose" (Section 23.1, 25 CFR) references itself to PL 95-608, 92 Stat. 3069, 25 USC 1901-1952, thereby indirectly implicating that it will address said sections, is the methodical absence of those sections most consequential to actual implementation of the Indian Child Welfare Act. The provisions of 25 USC 1901, 1902, 1911, 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1921, 1922, 1923, 1933, and 1934 (Sections 2, 101, 103, 104, 105, 196, 107, 109, 110, 111, 112, 113, 203, and 204, PL 95-608) are not discussed at all, and are therefore assumably without promulgation/codification through rules, regulations and delineated guidelines. Yet the title and summary claims these proposed rules are to ". . . emplement the provisions of the Indian Child Welfare Act of 1978," in order to ". . . protect the best interests of Indian children by promoting the stability and security of Indian families . . .",[212] BUT, where are such rules and regulations to accomplish the enactment/implementation of the Act? No where do the rules address rights and policies dictated by this new Act. It would seem from reading the rules as proposed, that the Indian Child Welfare Act was nothing more than a limited, highly regulated, irrelevant form of federal funding attempting to refurnish existing Indian Child/Family Welfare Programs--a trifling "allotment" from the intended provisions of S 1214, or the Act itself!

To specifically criticize each subpart of 25 CFR Part 23 would be redundant at best, as the same technical shortcoming discussed above on 25 CFR 13 are essentially the same here. A brief review of definitions for the terms singled out under Section 23.2, however, is deemed appropriate, as in other parts of this analysis it has been seen to control the processes of the pursuing provisions and subsequent impacts thereof.

Section 23.2, of the proposed rules, is a list of definitions/ explanations of various terms and phrases encompassing most of those found in Section 4, PL 95-608, with paragraph (1) adding: "For other applicable definitions refer to CFR 20.1 and 271.2"[214] (should read ", . . 272.2"). The terms "reservations and "secretary", furthermore are not defined in the new rules, although they are defined in Sec. 4 of PL 95-603. These two references (25 CFR 20.1, 272.2) are very troublesome because they not only introduce some 31 new terms not defined in the Act itself, there are also four terms--"child", "Indian", "Indian Court", and "Indian Tribe"--that are defined differently in each of the two references; and, whereas the term "Secretary" is consistantly defined in 25 CFR 20.1 and 272.2--but deleted from 25 CFR 23.2--the term "reservation" is not consistantly defined, nor does the definition, as intended by PL 95-608, appear in any part of 25 CFR 20.1, 23.2 (Proposed Rules), or 272.2. It should be reiterated that the issues surrounding the term "reservation" were an integral part of the dissenting views and objections to the Act. To say the least, the expungation of the term "reservation" as intended, and the fastidious embodiment of paragraph (1) to include terms of other parts of the codes is nothing more than a harbinger of the rules to follow, and a mediated dilution of the terminology. Lastly, it should be mentioned that the definitions for "Indian" and "Indian child" as stated in the proposed rules were greatly expanded in their specifications over all others to include that given by Congress in the Act itself!

The proposed rules for the implementation of the Indian Child Welfare Act clearly have but one intention: to promulgate, such deriding and unuseablecriterion, into such shameless rules that the Indian Child Welfare Act at once becomes important. The provisions of both Part 13 and 23 read like a flow chart for a computer program, complete with nested loops and if-then statements. The rules delineate exasperating and binding constructions, calculated to front as rules of implementation, when in fact they derail such efforts. In unique circumstances, through probable extended litigation and/or concessions on the part of tribes and organizations, jurisdiction on paper may actually be relaized, but there are, in the end, no regulations to support such a position, because neither the codes nor the Act provide for such.

The Indian Child WelfareAct was passed without the support of the Bureau of Indian Affairs, Department of the Interior, and their dissention is clearly manifested in the proposed rules 25 CFR Parts 13 and 23, which also, plainly demonstrate their ability to neutralize those aspects of the Act which they most vehemently objected to, at the cost of the Act itself. Combined, Parts 13 and 23, address only those issues the Bureau of Indian Affairs was against--blanket reassumption of jurisdiction over Indian child/family welfare programs, legal representation for those who could not afford it, monies to create or enhance existing child/family welfare programs, and the burden of proof (the latter through absence of addressing it at all). The proposed rules implement nothing, are completely worthless, and are in fact, a parasite to progress.

Conclusion

The investigation, study, and analysis of Indian child welfare and the Indian Child Welfare Act of 1978, has culminated in this report. The events and issues that make-up and surround Indian Child Welfare, as presented in this paper, are catastrophic for those who must live with such hardship, and are an embarassment to society. Undoubtedly the most paramount injustice of the entire field is the admittment of it's status quo continuation up to this very moment--Indian children are still being unfairly removed and Indian families are still being disrupted at outrageous rates. This condition exists, despite the enactment of the Indian Child Welfare Act, because as the Act and its pursuant rules and regulations exist today, they provide no protection, no support--financial, institutional, or moral--to implement the policies; BUT they do offer potential alternatives.

Situationally Indian child welfare could, and should, be in a tolerable condition, but the opposition is tought, and getting bigger every day. Social workers, due to poor/inadequate preparation and experience combined with low motivation and incentive, inherently apply middle-class to upper-class standards to their work, that creates an image of total disparity concerning the people involved in the cases to the social worker; which in turn justifies his actions--which are easiest for him to accomplish (especially when compared to his/her working hard and creating a positive result)--to toally disrupt families. Money runs the State, the State runs the Social Welfare Services, the social workers run the people in need--all a neat little structure. But the Indian Child Welfare Act has the potential to remove both funds and people, which would cause this structure to topple.. Without people in need of social welfare services the social worker has no job--a strong motivator for disrupting families rather than helping them, e.g., more problems, more work--and without money the state can't pay him nor take their share of the payroll pie. This means then, that many supposedlyinterested, humanitarians, are going to do their best to ignore the Indian Child Welfare Act, because it now comes down to number one himself, and of course the eigth wonder of the world, money. The social work game is in jeopardy, and they will muster their resources to protect itself, like any other animal!

The Indian Child Welfare Act was ammended to a state of gross ambiguity and the pursuant rules and regulations for implementation have failed to codify the Act. The result is nothing less, nor more, than a few pages entitled the Indian Child Welfare Act of 1978, that cannot presently be implemented or enforced, nor will they be--unless this debauchery is forcibly challenged.

The legal rudiments are available, thanks to the ambiguousness of the Act and the ineptness of the Bureau of Indian Affairs, and the potential resources are subliminally at hand; changes, additions, specifications (especially on guidelines), and positive utilization can be made, legally, through copious and energetic efforts to amend the rules and regulations so that they meet the real needs of Indian child and family welfare, yet remain within the scope of the Act itself. Senate Bill 1214 is an invaluable resource which, when used in conjunction with an analysis similar to this one, can provide the framework to work within, so that the work still complies with the Act. The process to achieve the desired goal of a functional policy for Indian child welfare is an immense maze of bureaucracy; the goal is an Act (amended as necessary) and a set of rules and regulations that can be forefully backed, e.g., consequences for failing to abide to the rules and regulations, and implemented to support the Indian child, his family, and their social welfare needs in positive, constructive ways. The requirement is decisive, action that can demonstrate to the powers of Congress and/or the Executive, through exposure of the current misinterpretations, that the Indian Child Welfare Act is indeed a "significant rule". Failure to do so carries a price tag too high, and is the same one that the Indian people have been paying interest on for a long time--maybe even since before the water flowed.

Footnotes

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5. Center for Social Research and Development, Legal and Jurisdictional Problems, p. 6.

6. Ibid.

7. U. S., Congress, House, Establishing Standards, p. 13.

8. Ibid., and, 31 U.S. 515 (6 Pet.) at 380 (1832).

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13. Ibid., p. 36.

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19. Ibid., p. 16.

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30. Ibid., p. 43.

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35. Ibid., p. 57.

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39. Ibid., p. 6.

40. Ibid., pp. 6-8.

41. Ibid., p. 8.

42. *Ibid.*, p. 9.

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. Center for Social Research and Development, *Legal and Jurisdictional Problems*, p. 2.

47. *Ibid.*

48. *Ibid.*, p. 25.

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*, p. 27.

52. *Ibid.*, p. 28.

53. *Ibid.*, p. 29.

54. *Ibid.*

55. *Ibid.*, p. 31.

56. *Ibid.*, p. 43.

57. Janet P. Swenson, *Supportive Care, Custody, Placement and Adoption of American Indian Children: A National Conference Sponsored by the American Academy of Child Psychiatry, Bottle Hollow, Utah, April 19-22, 1977* (Washington, DC: American Academy of Child Psychiatry, 1977), p. 8.

58. *Ibid.*, p. 14.

59. *Ibid.*

60. *Ibid.*, p. 16.

61. *Ibid.*, p. 17.

62. *Ibid.*

63. *Ibid.*, p. 21.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*, p. 28.

67. *Ibid.*, p. 31.

68. *Ibid.*

69. *Ibid.*, pp. 32-33.

70. *Ibid.*, p. 33.

71. *Ibid.*, pp. 30-31.

72. *Ibid.*, p. 40.

73. *Ibid.*, p. 49.

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78. *Ibid.*, p. 12.

79. U. S., Congress, House, *Establishing Standards*, p. 9.

80. *Ibid.*

81. *Ibid.*
82. *Ibid.*, pp. 9-12.
83. *Ibid.*, p. 10.

84. *Ibid.*, p. 11.

85. *Ibid.*

86. *Ibid.*, p. 12.

87. U. S., Congress, Senate, *The Indian Child Welfare Act*, p. 44.

88. *Ibid.*, p. 45.

89. *Ibid.*, p. 48.

90. *Ibid.*, pp. 52-53.

91. U. S., Congress, House, *Establishing Standards*, p. 19.

92. U. S., Congress, Senate, *Indian Child Welfare Act of 1978*, S 1214, 95th Cong., 2d Sess., 1978, p. 1.

93. U. S., Congress, House, *Indian Child Welfare Act of 1978*, HR 12533, 95th Cong., 2d Sess., 1978, p. 1.

94. _Ibid_.

95. _Ibid_., p. 2.

96. U. S., Congress, Senate, _Indian Child Welfare Act of 1978_, S 1214, 95th Cong., 2d Sess., 1978, p. 1.

97. U. S., Congress, House, _Indian Child Welfare Act of 1978_, HR 12533, 95th Cong., 2d Sess., 1978, p. 2.

98. U. S., Congress, Senate, _Indian Child Welfare Act of 1978_, S 1214, 95th Cong., 2d Sess., 1978, pp. 2-3.

99. U. S., Congress, House, _Indian Child Welfare Act of 1978_, HR 12533, 95th Cong., 2d Sess., 1978, p. 19.

100. U. S., Congress, Senate, _Indian Child Welfare Act of 1978_, S 1214, 95th Cong., 2d Sess., 1978, p. 2.

101. U. S., Congress, House, _Indian Child Welfare Act of 1978_, HR 12533, 95th Cong., 2d Sess., 1978, p. 2.

102. U. S., Congress, Senate, _Indian Child Welfare Act of 1978_, S 1214, 95th Cong., 2d Sess., 1978, p. 2.

103. _Ibid_.

104. Rupert Costo, "The Mormon Church", Wassaja, Volume 7, Number 1, January/February, 1979 (San Francisco: American Indian Historical Association), p. 3.

105. U. S., Congress, House, _Establishing Standards_, p. 20.

106. _Ibid_.

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108. U. S., Congress, Senate, _Indian Child Welfare Act of 1978_, S 1214, 95th Cong., 2d Sess., 1978, p. 2.

109. U. S., Congress, House, _Establishing Standards_, p. 19.

110. _Ibid_., pp. 19-20.

111. U, S., Congress, House, HR 12533, pp 1-2.

112, U. S., Congress, _Indian Child Welfare Act of 1978_, Public Law 95-608, 95th Cong., 2d Sess., November 8, 1978, p. 1.

113. U. S., Congress, House, _Establishing Standards_, p. 20.

114. U. S., Congress, Senate, S 1214, pp. 2-3.

115. U. S., Congress, House, HR 12533, p. 2.

116. U. S., Congress, Senate, S 1214, p. 2.

117. U. S., Congress, PL 95-608, p. 2.

118. U. S., Congress, Senate, S 1214, p. 2.

119. U. S. Congress, House, HR 12533, p. 2.

120. U. S., Congress, Senate, *Indian Child Welfare Act*, p. 16.

121. U. S., Congress, House, *Establishing Standards*, p. 3; and, Senate, *Indian Child Welfare Act*, pp. 2, 16.

122. U. S., Congress, PL 95-608, p. 2.

123. U. S., Congress, Senate, *Indian Child Welfare Act*, p. 4.

124. *Ibid.*, p. 17.

125. *Ibid.*, pp. 4-5.

126. *Ibid.*, p. 5.

127. *Ibid.*

128. *Ibid.*

129. *Ibid.*, pp. 17-18.

130. Costo, "The Mormon Church", p. 3.

131. U. S., Congress, PL 95-608; U. S. Codes Title 25.

132. U. S., Congress, House, *Establishing Standards*, p. 21.

133. U. S., Congress, Senate, *Indian Child Welfare Act*, p. 17.

134. *Ibid.*, p. 4.

135. U. S., Congress, House, *Establishing Standards*, p. 22.

136. *Ibid.*, p. 3.

137. U. S., Congress, Senate, *Indian Child Welfare Act*, p. 3.

138. U. S., Congress, House, *Establishing Standards*, p. 22.

139. U. S., Congress, Senate, *Indian Child Welfare Act*, p. 3.

140. U. S., Congress, House, *Establishing Standards*, p. 4.

141. *Ibid.*, p. 24.

142. *Ibid.*, pp. 24-25.

143. U. S., Congress, Senate, Indian Child Welfare Act, p. 18.

144. U. S., Congress, House, Establishing Standards, p. 25.

145. Ibid.

146. U. S., Congress, Senate, Indian Child Welfare Act, p. 5.

147. Ibid., p. 17.

148. U. S., Congress, House, Establishing Standards, p. 4.

149. Ibid., p. 24.

150. Ibid., p. 25.

151. U. S., Congress, Public Law 95-608, p. 1.

152. Ibid., p. 7.

153. U. S., Congress, House, Establishing Standards, p. 26.

154. U. S. Congress, Senate, Indian Child Welfare Act, p. 7.

155. U. S. Congress, House, Establishing Standards, p. 26.

156. Ibid.

157. Ibid.

158. U. S., Congress, Senate, Indian Child Welfare Act, p. 9.

159. U. S., Congress, House, Establishing Standards,

160. Gerard, Forrest J., Assistant Secretary to the Interior, letter to the Hon. Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, House of Rep., 6 June 1978, p. 1.

161. Ibid.

162. Ibid.

163. Ibid., pp. 1-2.

164. Ibid., p. 2.

165. Ibid.

166. Ibid.

167. Ibid., p. 3.

168. Ibid.

169. U. S., Congress, Public Law 95-608, p. 3.

170. Gerard, Lttr., 6 Jun 1978, p. 3.

171. Ibid., p. 4.

172. Ibid.

173. Ibid., p. 5.

174. Ibid.

175. Ibid., p. 6.

176. Ibid.

177. Ibid.

178. Ibid.

179. Gerard, Forrest J., Assistant Secretary to the Interior, Letter to the Honorable Thomas P. O'Neille, Jr., Speaker, House of Rep., 18 Sep 1978, p. 1.

180. Ibid., p. 2.

181. Ibid.

182. Ibid.

183. U. S., Congress, House, Establishing Standards, p. 42.

184. Ibid.

185. Ibid, p. 43.

186. Ibid.

187. Ibid.

188. Ibid., pp. 43-44.

189. Ibid., p. 44.

190. Ibid., pp. 44-45.

191. Ibid., p. 45.

192. Ibid.

193. Ibid.

194. U. S., Congress, Public Law 95-608, p. 9.

195. *Ibid*., p. 1.

196. David Ethbridge, "Tribal Reassumption of Jurisdiction Over Child Custody Proceedings (25 CFR Part 13), (Proposed Rule)", *Federal Register*, Volume 44, Number 79, April 23, 1979, pp. 23992; and Butler, Raymond V., and Ethbridge, David, "Indian Child Welfare Act (25 CFR Part 23), (Proposed Rule)", *Federal Register*, Volume 44, Number 79, April 23, 1979, p. 23993

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200. Lavis, Rich, "Recommended Guidelines for State Courts--Indian Child Welfare Proceedings (Notices)", *Federal Register*, Volume 44, Number 79, April 23, 1979, pp. 24000-24002.

201. *Ibid*., p. 24000.

202. *Ibid*.

203. U. S., Congress, Senate, *Indian Child Welfare Act*, pp. 1-31.

204. Ethbridge, "Tribal Reassumption of Jurisdiction Over Child Custody Proceedings (25 CFR Part 13), (Proposed Rule):, *Federal Register*, Volume 44, Number 79, April 23, 1979, p. 23992.

205. *Ibid*., p. 23993.

206. *Ibid*.

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208. *Ibid*., p. 23992.

209. *Ibid*.

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211. Butler and Ethbridge, "Indian Child Welfare Act (25 CFR Part 23), (Proposed Rules)", *Federal Register*, Volume 44, Number 79, April 23, 1979, p. 23994.

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Appendix A

Indian Child Welfare Statistical Survey

INDIAN CHILD WELFARE STATISTICAL SURVEY

Data from Indian Child Welfare Statistical Survey, July, 1976, Assoc. on Amer. Indian Affairs

	INDIAN ADOPTION	NON-INDIAN ADOPTION	INDIAN FOSTER CARE	NON-INDIAN FOSTER CARE	PERCENTAGE IN NON-INDIAN HOMES
ALASKA	1/29.6	1/134.7	1/72	1/219	
ARIZONA	1/52.7	1/220.4	1/98	1/263	
CALIFORNIA	1/26.3	1/219.3	1/124	1/366.6	92.5%
IDAHO	*	*	1/12.9	1/82.7	
MAINE	.4%	*	1/13.2	1/251.9	
MICHIGAN	1/8.1	1/30.3	1/90	1/641	
MINNESOTA	1/7.9	1/31.1	1/17.2	1/283.8	97.5%
MONTANA	1/30	1/144.6	1/28.3	1/363.5	87%
NEVEDA	*	*	1/47.3	1/333.8	
NEW MEXICO	*	*	1/147	1/343	
NEW YORK	*	*	1/74.8	1/226.6	96.5%
NORTH DAKOTA	1/30.4	1/86.2	1/27.7	1/553.8	75%
OREGON	1/17	1/19.2	1/27.7	1/228.5	
OKLAHOMA	1/40.8	1/188.1	1/135	1/551	
SOUTH DAKOTA	1/18	1/32.4	1/22	1/492.1	
WASHINGTON	1/21.6	1/407	1/28.9	1/275	80%
WISCONSIN	1/14.3	1/251.5	1/19	1/252	
WYOMING	*	*	1/28.9	1/301.9	57%
UTAH	1/20.4	1/68.5	1/26.4	1/402.9	

Appendix B

Dissenting Views

DISSENTING VIEWS

H.R. 12533 should be sent back to the Subcommittee on Indian ffairs and Public Lands for additional consideration because of ajor defects in the bill and because of inadequate opportunity for ffected States and agencies to testify on the bill.

I feel a special responsibility to the House of Representatives to ubmit this dissenting opinion because I was the only Member ex-ressing grave concerns about many of the bill's provisions.

Largely because of my concerns about legal protection for the ndian child, the natural parents, and the adoptive parents, many hanges were made at a staff level to improve the bill. These changes vere many and substantive and much improvement was made in this egard. Amendments also helped improve the bill but major defects emain.

Among these numerous issues are the cost to the States to enforce he provisions, new layers of programs for Indian tribes, and basic onstitutional issues like State-Indian jurisdiction. These were not arefully enough considered during markup.

I call these problems to the attention of my colleagues and urge hat the bill be rejected until those issues can more carefully be iscussed by both the Congress and the public. Below I detail the problems.

HISTORY OF H.R. 12533

H.R. 12533 is the outgrowth of S. 1214 which was passed by the Senate and assigned to the House Subcommittee on Indian Affairs and Public Lands. This bill was the markup vehicle in the subcommittee and was reported with very little discussion or participation by members.

Subsequent to the subcommittee markup, the subcommittee staff, apparently noting the major defects of S. 1214, drafted an entirely new bill, H.R. 12533, and circulated it as the markup vehicle for the full Interior and Insular Affairs Committee.

Markup was scheduled for 2 or 3 weeks during which time I raised objection and numerous questions which resulted in many of the changes being made to improve the legal protections now contained n the bill.

To my knowledge the new bill, H.R. 12533 and the subsequent drafts were never generally circulated to the States, juvenile judges, public and private welfare agencies, or even to the Indian tribes.

The bill should have been circulated for comment in light of the major revisions made and being considered.

MANY GROUPS SOUGHT ADDITIONAL TIME

It should be pointed out that many groups, including the Departments of Interior and Justice, expressed the need for either major changes or additional time to study the bill and comment.

For example the Justice Department in a letter dated May 23, 1978, for Assistant Attorney General Patricia Wald to the committee chairman expressed numerous practical and constitutional concerns with the language in S. 1214. While some of those problems may have been alleviated in H.R. 12533, I am unaware of any further review by the Justice Department. In that letter, discussing the House version, Ms. Wald raised some serious questions: (1) Whether the bill under *White* v. *Califano* might hold the Federal Government responsible for the financial support of Indians even though no money had been appropriated, (2) whether the bill might displace any existing State court jurisdiction on Indian child welfare matters in Public Law 280 States even where tribal courts did not exist, and (3) whether the bill might have the effect of reestablishing diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements.

In regard to (3) she wrote:

> We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

To my knowledge this issue was never discussed.

The Department of Interior, in a seven-page letter dated June 6, 1978 from Assistant Secretary Forrest J. Gerard, raised numerous questions about H.R. 12533. Among other considerations Mr. Gerard said:

> We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

I would point out that title II remains in the bill largely as drafted and that it even provides payment to adoptive parents of Indian children. In addition, it provides for construction of Indian family service facilities off of reservations regardless of the size of the tribe or the availability of existing services and facilities.

It should be noted that many of the concerns expressed by Mr. Gerard, who is a strong advocate of Indian, were not, in my opinion, properly addressed.

In a memorandum dated June 19, 1978, from the Congressional Research Service, additional points were raised which I believe should have been considered more thoroughly.

Aside from the above Federal concerns, I am even more distressed by objections raised by officials in my State of Montana after I forwarded a copy of the bill for review.

On June 20, 1978, the following telegram was received by the committee from Gov. Thomas L. Judge, of Montana.

> It has come to my attention that you have scheduled the markup on H.R. 12533, the Indian Child Welfare Act. This legislation identifies some real problems and we are in agreement with the intent of the bill. However, there may be some

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> ill effect. I urge you to hold hearings on the bill to allow us time to present our concern. I am sure you want to insure that problems are solved without creating new ones at the same time. Thank you very much for your consideration of this request.

That message was received just 1 day before reporting the bill nd the request was not granted. I suspect the concerns of Governor udge would have been reflected by other States, especially Public aw 280 States, had they been more aware of the provisions.

Below is a letter from the State of Montana attorney for social and ehabilitation services. The letter is unsigned because it was first ransmitted to me by telecopier on the day before the markup and ubsequently sent in the form below and not received in my office ntil 5 days after the markup. I suggest all Members will want to read his letter before voting on the bill.

STATE OF MONTANA,
SOCIAL AND REHABILITATION SERVICES,
Helena, Mont., June 20, 1978.

Hon. RON MARLENEE,
Congressman from Montana, U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MARLENEE: In response to a request from Bob Ziemer of your staff, the Office of Legal Affairs of the Montana Department of Social and Rehabilitation Services has reviewed H.R. 12533—The Indian Child Welfare Act.

Our study of the bill has been hurried, but we can foresee numerous problems in the delivery of social services to Montana Indian children and families if the act is passed in its present form. For this reason we urge you to ask the Committee on Interior and Insular Affairs to defer further markup on the bill until affected States, and especially Montana, can more fully comment on its consequences.

Constitutional questions aside, several problems of implementation are readily apparent from reading the bill. For example, although the bill requires State courts to give preference to certain homes in placing Indian children based on evidence in the record, the bill does not provide any mechanism requiring the family or the tribe to present such evidence. Nor does it create a means by which already overburdened State courts can discover such evidence on their own.

But even more disturbing to the Montana Department of Social and Rehabilitation Services is the bill's lack of clarity on the issue of payment for social services for Indian children and families. Section 201(b) of title II of the bill states:

> The provision or possibility of assistance under this act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other other federally assisted program.

This language suggests a strong possibility that a State whose courts had not exercised jurisdiction over an Indian child or family would be called upon to fund at least part of the social services delivered to that

Indian child or family. This office believes that in all cases in which an Indian tribal court exercises jurisdiction the financial burden for providing social services should fall exclusively upon the tribe and the Federal Government.

In addition, it appears that tribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts and, hence, the State agencies administering title IV and title XX will have no choice but to accept those cases. Such a situation is clearly inequitable.

As can be seen from these comments the Indian Child Welfare Act leaves many issues unresolved. Although quick action on the bill may be politically expedient, the Montana Department of Social and Rehabilitation Services strongly recommends that full and deliberate consideration be given to all aspects of the bill.

If we can provide further assistance to you, please feel free to contact us.

Sincerely yours,

RICHARD A. WEBER,
Staff Attorney, Office of Legal Affairs,
Montana Department of Social and
Rehabilitation Services.

With regard to the above letter, Members will note the concern expressed about the possible financial burden. I need not remind my colleagues that one of the major costs of local and State governments are the courts. And in light of the Proposition 13 attitude across this country I question the wisdom of passing legislation which may have significant impact on State and county budgets without one iota of evidence in the record as to what that cost might be. On this issue alone the bill ought to be rejected and returned to committee for additional hearings.

It should be noted, in fairness, that many church groups urged passage of the bill. However, the National Conference of Catholic Charities raised many substantive questions. While many of those were resolved in the redrafting of the bill and the amendment process, others remain outstanding.

But perhaps one of the strongest arguments for defeating the bill came in a letter of June 12, 1978, from the National Council of State Public Welfare Administrators. The concluding paragraph of that letter said:

> The National Council of State Public Welfare Administrators believes that H.R. 12533 should not be enacted prior to a much broader consultation than has thus far been achieved by the responsible congressional committees. Enclosed is a resolution approved by representatives of 38 States and two jurisdictions present at the council meeting on June 7-8, 1978 in support of this recommendation.

Below is a copy of the resolution adopted by over two-thirds of the States public welfare administrators.

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NATIONAL COUNCIL OF STATE
PUBLIC WELFARE ADMINISTRATORS
OF THE AMERICAN PUBLIC WELFARE ASSOCIATION,
Washington, D.C., June 7, 1978.

SOCIAL SERVICES COMMITTEE RECOMMENDATIONS[3]

ndian Child Welfare Act—H.R. 12533 (S. 1214)

1. Support objectives of proposed legislation to establish safeuards against separation of Indian children from their parents and nappropriate foster care or adoptive placements outside the cultural etting of the Indian child.

2. Recommend the council note that, while many constructive hanges over the Senate-passed bill (S. 1214) have been incorporated n the House version, there remain a significant number of provisions hose impact on Indian families, tribal courts, State courts, and tate and local child welfare services programs needs to be explored nore extensively than has been done.

3. Express concern that the bill as written may work against its bjective of achieving stability and permanency for the Indian child hose home situation is such that temporary or permanent placement ecomes a necessity, and that the result may be many such children ill be well served neither by the state/local public child welfare system r by the Indian community.

4. Recommend that H.R. 12533 in its June 7 version be widely isseminated for discussion among affected groups, including the more han 270 federally recognized governing bodies of Indian tribes, bands, nd groups, as well as to representatives of State courts, juvenile udges, and public and private child welfare services agencies, before eing debated by the full House.

In addition, it is my understanding that a telegram was received by he full committee just prior to markup from the National Council of Juvenile and Family Court Judges, or a similar organization, asking for additional time for review. I did not see a copy of that communication but I was advised it exists.

I apologize for this lengthy dissent because basically I agree that some legislation is needed to give Indian tribes greater voice in the placement of Indian children. However, this bill goes way beyond what is needed by authorizing a whole new layer of Indian programs both on and off the reservations, payments to adoptive parents of adopted children, a certain impact on State courts, and the possible upsetting of boundaries for jurisdictional questions. For these and the other reasons outlined above I urge my colleagues to defeat this bill.

RON MARLENEE.

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[3] Approved by the National Council of State Public Welfare Administrators on June 7, 1978.

Appendix C

Letters from Assistant Secretary Forrest Gerard

United States Department of the interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 1 6 1978

Honorable Thomas P. O'Neill, Jr.
Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

On June 6, 1978, this Department wrote to the House Committee on Interior and Insular Affairs to make its views known on H.R. 12533, "The Indian Child Welfare Act of 1978," and to urge the Committee to make recommended changes during markup of the bill. In that letter we stated that we would recommend that the bill be enacted if it were amended as detailed in that letter and as recommended by the Department of Justice. A copy of our letter is attached for your reference.

On July 24, 1978, the Committee reported out H.R. 12533. Some of the changes recommended by this Department were made by the Committee; however, major problems remain. The purpose of this letter is to make you aware of our remaining major problems and to urge you to work with your colleagues to amend the bill to address these problems during House floor consideration.

We continue to urge that Title II of the bill, Indian Child and Family Programs, be deleted. Many of the authorities granted by Title II are troublesome or are unnecessary because they duplicate authorities in present law. We find especially objectionable the following features of Title II:

- the authorization in section 201(a)(7) for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs. We also believe that the amount of any such support should be limited to the relevant state foster care rate for maintenance and medical needs.
- the authorization in section 202 for grants to establish and operate off-reservation Indian child and family service programs.
- the authorization in section 201(b) for the use of Federal funds appropriated under Title

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II of H.R. 12533 to be used as the non-Federal matching share in connection with other Federal funds.

We also urge deletion of section 102(b) which requires that court-appointed counsel be provided to any indigent parent of an Indian child who is the subject of a proceeding under the Act. We believe that there has not been a significant demonstration of need for such a provision to justify the financial burden it would impose on both the states and the Federal government.

We also believe that Title I of the bill should not take effect until one year after the date of its enactment. This would allow the states adequate time to establish necessary procedures to implement the provisions of that Title.

! We strongly urge you and the members of the House to delete Title II of H.R. 12533 and section 102(b). Only with these changes would we be able to support the bill.

? The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Forrest J. Gerard

Assistant SECRETARY Forrest J. Gerard

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 6 - 1978

Honorable Morris K. Udall
Chairman, Committee on Interior and
Insular Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This Department would like to make its views known on H.R. 12533, "The Indian Child Welfare Act of 1978," and urges the Committee to make the recommended changes during mark-up of the bill. We understand the Department of Justice has communicated its concerns with the bill to the Committee, and we urge the Committee to amend the bill to address those concerns.

If H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted.

Title I of H.R. 12533 would establish nationwide procedures for the handling of Indian child placements. The bill would vest in tribal courts their already acknowledged right to exclusive jurisdiction over Indian child placements within their reservations. It would also provide for transfer of such a proceeding from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects.

Requirements dealing with notice to tribes and parents and consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.

Title I would also impose on state courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon a finding of indigency by the court.

State courts would also be required, under the provisions of H.R. 12533, to apply preference standards set forth in section 105 in the placing of an Indian child. These preferences would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values.

Title II of H.R. 12533, entitled "Indian Child and Family Programs," would authorize the Secretary of the Interior to make grants to Indian tribes and organizations for the establishment of Indian family service programs both on and off the reservation. Section 204 would authorize $26,000,000 for that purpose.

Title III of H.R. 12533, entitled "Recordkeeping, Information Availability, and Timetables," would direct the Secretary of the Interior to maintain records, in a single central location, of all Indian child placements affected by the Act. Those records would not be open, but information from them could be made available to an Indian child over age 18, to his adoptive or foster parent, or to an Indian tribe, for the purpose of assisting in the enrollment of that child in an Indian tribe.

Title IV of H.R. 12533, entitled "Placement Prevention Study," would direct the Secretary of the Interior to prepare and submit to Congress a plan, including a cost analysis statement, for the provision to Indian children of schools located near their homes.

Although we support the concept of promoting the welfare of Indian children, we urge that the bill be amended in the following ways.

Section 4(9) defines the term "placement". This definition is crucial to the carrying out of the provisions of Title I. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be excepted from the definition of the term "placement". We believe that the protections provided by this Act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

Section 101(a) would grant to Indian tribes exclusive jurisdiction over Indian child placement proceedings. We believe that section 101(a) should be amended to make explicit that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody. The bill does not address the situation where two parental views are involved. Therefore, the definition of domicile is inadequate and the use of the word "parent" as defined does not articulate the responsibilities of the courts to both parents.

We believe that reservations located in states subject to P.L. 83-280 should be specifically excluded from section 101(a), since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassumption of tribal jurisdiction in those states.

Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.

Section 101(e), regarding full faith and credit to tribal orders, should be amended to make clear that the full faith and credit intended is that which states presently give to other states.

Section 102(a) would provide that no placement hearing be held until at least thirty days after the parent and the tribe receive notice. We believe that in many cases thirty days is too long to delay the commencement of such a proceeding. We suggest that the section be amended to allow the proceeding to begin ten days after such notice with a provision allowing the tribe or parent to request up to twenty additional days to prepare a case. This would allow cases where the parents or tribe do not wish a full thirty days notice to be adjudicated quickly, while still affording time to the parent or tribe who needs that time to prepare a case. We also suggest that the section be amended to require the Secretary to make a good faith effort to locate the parent as quickly as possible and to provide for situations in which the parent or Indian custodian cannot be located.

We also believe that there is a need for specific emergency removal provisions in H.R. 12533. A section should be added allowing the removal of a child from the home without a court order when the physical or emotional well-being of the child is seriously and immediately threatened. That removal should not exceed 72 hours without an order from a court of competent jurisdiction.

Section 102(b) would provide the parent or Indian custodian of an Indian child the right to court-appointed counsel if the court determines that he or she is indigent.

!

We are opposed to the enactment of this section. We do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.

Section 102(c) would allow all parties to a placement to examine all documents and files upon which any decision with respect to that placement may be based. This provision conflicts with the Federal Child Abuse and Neglect Treatment Act, P.L. 93-247, which provides confidentiality for certain records in child abuse and neglect cases. We believe that such a broad opening of records would lead to less reporting of child abuse and neglect. However, we do recognize the right of the parent to confront and be given an opportunity to refute any evidence which the court may use in deciding the outcome of a child placement proceeding. We recommend that the Indian Child Welfare Act conform with the provisions of P.L. 93-247.

Section 102(e) of H.R. 12533 would require the state court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe that the burden of proof is too high. We would support the language found in section 101(b) of the Senate-passed S. 1214, which would impose a burden of clear and convincing evidence and would set down certain social conditions which could not be considered by the court as prima facie evidence of neglect or abuse. We also believe that the language "will result" in serious damage to the child should be amended to read "is likely to result" in such damage. It is almost impossible to prove at such a high burden of proof that an act will definitely happen.

Section 105 of H.R. 12533 would impose on State courts certain preferences in placing an Indian child. Subsection (c) would substitute the preference list of the Indian child's tribe where the tribe has established a different order of preference by resolution.

Language should be included in that subsection which would require that resolution to be published in the Federal Register and later included in the Code of Federal Regulations. This would allow the State court easy access to the preferences of the various tribes.

It is also unclear what the last sentence in subsection (c) means in allowing the preference of the Indian child or parent to be considered "where appropriate". We believe that the preference of the child and the parent should be given due consideration by the court regardless of whether that court is following the preferences set forth in section 105(a) or 105(b), or whether it is following a preference list established by an Indian tribe. Therefore, we recommend that a separate subsection be added to section 105 stating that the preferences of the Indian child and of the parent be given due consideration by the court whenever an Indian child is being placed.

Section 106 deals with failed placements and requires that, whenever an Indian child is removed from a foster home or institution in which the child was placed for the purpose of further placement, such removal shall be considered a placement for purposes of the Act. We see no reason for requiring a full proceeding every time a child is moved from one form of foster care to another. We do, however, recognize the need for notification of the parents and the tribe of such move and for applying the preferences set forth in section 105. Therefore, we recommend that subsection (b) of section 106 be amended to require the notice and preference provisions to apply when a child is moved from one form of foster care to another and to require the removal to be considered as a new placement only in the case where termination of parental rights is at issue.

Section 107 deals with the right of an Indian who has reached age 18 and who has been the subject of a placement to learn of his or her tribal affiliation. We believe that rather than apply to the court for such information, the individual involved should apply to the Secretary of the Interior. Under the provisions of Title III, the Secretary would maintain a central file with the name and tribal affiliation of each child subject to the provisions of the Act. Therefore, the Secretary would be more likely than the State court to have the information needed to protect any rights of the individual involved which may flow from his or her tribal affiliation.

Finally, with respect to Title I, we believe that a section should be added which would state that the provisions of the Act should apply only with respect to placement proceedings which begin six months after the date of the enactment of the Act. This would allow states some time to familiarize themselves with the provisions of the Act and would thus avoid the chance of having large numbers of placements invalidated because of failure to follow the procedures of the Act.

Such a section should also state that the intent of the Act is not the pre-emption by the Federal government of the whole area of Indian child welfare and placement. In any case where a state has laws which are more protective than the requirements of this Act, e.g., with regard to notice and enforcement, those laws should apply.

We believe that many of the authorities granted by Title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of Title II.

We find especially objectionable in Title II the following:

- the authorization for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs. We also believe that the amount of any such support would have to be limited to the prevalent state foster care rate for maintenance and medical needs.
- the authorization for grants to establish and operate off-reservation Indian child and family service programs.
- the new separate authorization of $26,000,000 in section 203(b) of Title II.
- the provisions of section 201(c) which would authorize every Indian tribe to construct, operate, and maintain family service facilities regardless of the size of the tribe or the availability of existing services and facilities.
- the authorization for the use of Federal funds appropriated under Title II to be used as the non-Federal matching share in connection with other Federal funds.

However, we believe that the last sentence of section 201(b), providing that licensing or approval by an Indian tribe should be deemed equivalent to that done by a state, should remain in the bill under Title I as a separate section.

We have no objection to section 301 of Title III of H.R. 12533. We believe that requiring the Secretary to maintain a central file on Indian child placements will better enable the Secretary to carry out his trust responsibility, especially when judgment funds are to be distributed.

However, we object to the provisions of section 302(c), which would require the Secretary to present any proposed revision or amendment of rules and regulations promulgated under that section to both Houses of Congress. Any such proposed revision or amendment would be published in the Federal Register and we believe that placing this additional responsibility on the Secretary is both burdensome and unnecessary.

We believe that section 401 of Title IV should be amended to read as follows:

> Sec. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.
>
> (b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within one year from the date of this Act, a report on the feasibility of providing Indian children with schools located near their homes. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program, and that enactment of the House subcommittee's present version of H.R. 12533 would not be consistent with the Administration's objectives.

Sincerely,

Forrest J. Gerard

Forrest J. Gerard
Assistant SECRETARY

Appendix D

PL 95-608

Y. 1/3: 95-608 (S)
REF

Public Law 95-608
95th Congress

An Act

UNIVERSITY OF MONTANA LIBRARY
JAN 19 1979

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Nov. 8, 1978
[S. 1214]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1978".

Indian Child Welfare Act of 1978.
25 USC 1901 note.

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

25 USC 1901.

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

Congress, responsibility for protection of Indians.

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

SEC. 3. The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 USC 1902.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

Definitions.
25 USC 1903.

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

SC 1606.

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b). in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

SC 1602.

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by th[illegible]nited States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

Indian tribes, exclusive jurisdiction over Indian child custody proceedings.
25 USC 1911.

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Foster care placement, court proceedings.
25 USC 1912.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

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SC 1913.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

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(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

C 1914.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

Adoptive placement of Indian children.
25 USC 1915.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Petition, return of custody.
25 USC 1916.

SEC. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

Removal from foster care home.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 USC 1917.

SEC. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement,

the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

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SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

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(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

Indian
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SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred a[illegible] eighty days' written notice to the other party. Such

revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

Improper removal of child from custody. 25 USC 1920.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 USC 1921.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

Emergency removal of child. 25 USC 1922.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Effective date. 25 USC 1923.

SEC. 113. None of the provisions of this title, except sections 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

25 USC 1931.

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

2 USC 620, 1397.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

Additional services.
25 USC 1932.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

Funds.
25 USC 1933.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. 25 USC 13.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401). 25 USC 1934. 25 USC 1603.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

Final decree, information to be included. 25 USC 1951.

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

Effective date. Rules and regulations. 25 USC 1952.

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.

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TITLE IV—MISCELLANEOUS

y schools.
USC 1961.

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

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(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

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ate.
USC 1962.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

USC 1963.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Approved November 8, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1386, accompanying H.R. 12533 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 95-597 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD:
Vol. 123 (1978): Nov. 4, considered and passed Senate.
Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S. 1214, amended, passed in lieu.
Oct. 15, Senate concurred in House amendments.

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Appendix E

HR 12533

Union Calendar No. 755

95TH CONGRESS
2D SESSION

H. R. 12533

[Report No. 95–1386]

A BILL

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

By Mr. Udall, Mr. Roncalio, Mr. Baucus, Mr. Bingham, Mr. Blouin, Mrs. Burke of California, Mr. Phillip Burton, Mr. Carr, Mr. Dellums, Mr. Fraser, Mr. Miller of California, Mr. Risenhoover, Mr. Seiberling, Mr. Stark, Mr. Tsongas, Mr. Vento, and Mr. Weaver

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May 3, 1978

Referred to the Committee on Interior and Insular Affairs

July 24, 1978

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

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ICE: THIS MATERIAL MAY BE P
YRIGHT LAW (TITLE 17 U. S. CODE)

Union Calendar No. 755

95th CONGRESS
2d Session

H. R. 12533

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[Report No. 95–1386]

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1978

Mr. UDALL (for himself, Mr. RONCALIO, Mr. BAUCUS, Mr. BINGHAM, Mr. BLOUIN, Mrs. BURKE of California, Mr. PHILLIP BURTON, Mr. CARR, Mr. DELLUMS, Mr. FRASER, Mr. MILLER of California, Mr. RISENHOOVER, Mr. SEIBERLING, Mr. STARK, Mr. TSONGAS, Mr. VENTO, and Mr. WEAVER) introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

JULY 24, 1978

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That this Act may be cited as the "Indian Child Welfare Act of 1978"~~.

~~FINDINGS~~

~~SEC. 2. Recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people, the Congress finds that:~~

~~(a) An alarmingly high percentage of Indian children living within both urban communities and Indian reservations, are separated from~~ their natural ~~parents through the actions of nontribal government~~ agencies or private ~~individuals or private agencies and are~~ placed in ~~institutions (including boarding schools)~~, or in ~~foster or~~ adoptive homes~~, usually with~~ non-Indian ~~families.~~

~~(b) The separation of Indian children from their families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand~~ the ~~nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the agency officials~~ involved ~~are unfamiliar with, and often disdainful~~ of Indian culture ~~and society; (4) the conditions which led to~~ the separation are not ~~demonstrably harmful or are remediable or transitory in character; and (5) responsible~~ tribal authorities are not consulted ~~about or even informed of the nontribal government actions.~~

~~(c) The separation~~ of Indian children from ~~their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian chil-~~

~~dren for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For Indians generally, the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.~~

~~DECLARATION OF POLICY~~

~~SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.~~

~~DEFINITIONS~~

~~SEC. 4. For the purposes of this Act, except as otherwise specifically provided, the term—~~

~~(1) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent;~~

~~(2) "Indian" means any person who is a member of an Indian tribe;~~

~~(3) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;~~

~~(4) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;~~

~~(5) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;~~

~~(6) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;~~

~~(7) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided by the Secretary to Indians because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697);~~

~~(8) "parent" means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;~~

~~(9) "placement" means any action resulting in the removal of an Indian child from the custody of his or her parent or Indian custodian where such removal results in the loss by such parent or Indian custodian of the unconditional right to regain custody upon demand;~~

~~(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code. In any case where it has been judicially determined that a~~

~~reservation has been diminished or the boundaries disestablished, the term shall include the lands within the last recognized boundaries of such diminished reservation prior to the enactment of the statute which resulted in the diminishment or disestablishment;~~

~~(11) "Secretary" means the Secretary of the Interior; and~~

~~(12) "tribal court" means a court with jurisdiction over child placements and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child placement proceedings.~~

~~TITLE I—CHILD PLACEMENT~~

~~JURISDICTION OF TRIBAL AND STATE COURTS~~

~~FULL FAITH AND CREDIT~~

~~SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any placement of an Indian child who resides on or is domiciled within the reservation of such tribe.~~

~~(b) In any State court proceeding for the placement of an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court shall transfer such proceeding to the jurisdiction of the tribe upon the petition of the parent or Indian custodian or, absent~~

~~objection by the parent or Indian custodian, the Indian tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.~~

~~(c) The domicile of an Indian child shall be deemed that of the parent or Indian custodian.~~

~~(d) In any State court proceeding for the placement of an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene, at any point in the proceeding.~~

~~(e) The United States, every State, every territory, or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child placements.~~

~~INVOLUNTARY PLACEMENT PROCEDURE~~

~~SEC. 102. (a) In any involuntary proceeding in a State court, the party seeking the placement of an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with a return receipt requested, of the pending proceeding and their right of intervention. If the identity or location of the parent or Indian custodian and tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have ten days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No placement~~

~~hearing shall be held~~ until ~~at least thirty days after receipt of notice.~~

~~(b) In any case where the court determines indigency, the parent or Indian custodian~~ shall have the ~~right to court-appointed counsel~~ in the placement ~~proceeding. The court may, in its discretion,~~ appoint counsel ~~for the child upon a finding~~ that such appointment is ~~in the best interest of the child.~~ Where State law makes no provision ~~for appointment of counsel in such~~ proceedings, ~~the court shall promptly notify the Secretary~~ upon ~~appointment of counsel, and the Secretary,~~ upon certification of the presiding judge, ~~is authorized to~~ pay reasonable fees and expenses ~~out of funds which may be~~ appropriated ~~pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).~~

~~(c) Each party to a placement under State law of an Indian child shall have the right to examine all reports or other documents and files upon which any decision with respect to placement may be based.~~

~~(d)~~ Any party seeking to effect ~~a permanent placement of an~~ Indian child under State ~~law shall show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these services have proved unsuccessful.~~

~~(c) No placement may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony by qualified expert witnesses, that the continued custody of the child will result in serious emotional or physical damage to the child.~~

~~VOLUNTARY PLACEMENT PROCEEDINGS~~

~~SEC. 103. (a) Where any parent or Indian custodian or expectant Indian parent voluntarily consents to a placement, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. This provision shall not apply to a case in which the parent or custodian petitions the court for a temporary placement in which the child is subject to return upon demand.~~

~~(b) Any parent or Indian custodian may withdraw consent to a temporary or permanent placement other than an adoptive placement at any time and, upon such withdrawal, the child shall be returned to the parent or Indian~~

~~custodian unless an involuntary placement proceeding subject to the provisions of section 102 is commenced and the court orders a continuance of the placement pending adjudication.~~

~~(c) In any adoptive placement, consent may be withdrawn for any reason at any time prior to the entry of a final decree of adoption and, after the entry of the final decree, such consent may be withdrawn upon grounds of fraud or duress, and the child shall be returned to the parent or Indian custodian in the absence of a showing that return of the child will result in serious emotional or physical damage to the child.~~

~~(d) Nothing in this section shall be deemed to limit or alter the rights of a parent who has not consented to a placement.~~

~~ENFORCEMENT~~

~~SEC. 104. Any Indian child who is the subject of a placement, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such placement upon a showing that such placement violated the provisions of sections 102 and 103 of this Act. No adoption which has been effective for two years or more may be invalidated under the provisions of this section.~~

~~PLACEMENT PREFERENCES~~

~~SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the child's tribe; and (3) other Indian families.~~

~~(b) In any nonadoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with—~~

~~(i) a member of the Indian child's extended family;~~

~~(ii) a foster home licensed, approved, or specified by the Indian child's tribe;~~

~~(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or~~

~~(iv) an institution for children operated or approved by an Indian tribe or other Indian organization which has a program suitable to meet the Indian child's needs.~~

~~(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the adoptive agency or court shall follow such order. Where appropriate, the preference of the Indian child or parent shall be considered.~~

~~(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.~~

~~(e) A record of each placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts made to comply with the order of preference specified in this section. Such record shall be made available at any time upon request of the Secretary or the Indian child's tribe.~~

~~FAILED PLACEMENTS~~

~~SEC. 106. (a) Whenever a final decree of adoption has been vacated or set aside or the adoptive parents voluntarily consent to the permanent placement of an Indian child, a biological parent or a prior Indian custodian may petition for return of custody.~~

~~(b) Except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed, whenever an Indian child is removed from a foster home or institution in which the child was placed for the purpose of further placement, such placement shall be in accordance with the provisions of this Act.~~

~~RIGHT TO LEARN OF TRIBAL AFFILIATION~~

~~SEC. 107. Upon application by an Indian individual who has reached age eighteen and who was the subject of an adoptive placement, the court which entered the final placement decree shall inform such individual of the tribal affiliation, if any, of his or her biological parents and provide such other information as may be necessary to protect any rights flowing from his or her tribal relationship.~~

~~RETROCESSION OF JURISDICTION~~

~~SEC. 108. (a) The provisions of this section shall apply to—~~

~~(1) any Indian tribe which became subject to State jurisdiction under Public Law 83-280 or any other Federal law;~~

~~(2) any Indian tribe in Oklahoma which became subject to State jurisdiction under any Act enacted after January 1, 1886;~~

~~(3) any Indian tribe or Native Village of Alaska now or hereafter recognized by the Secretary as having powers of self-government.~~

~~(b) Any Indian tribe described in subsection (a) may assume, in accordance with the provisions of this section, jurisdiction over child welfare matters as provided in this Act.~~

~~(c) Before any Indian tribe may assume jurisdiction under subsection (b), such tribe shall present to the Secre-~~

~~tary for approval a petition to assume such jurisdiction which includes a suitable plan to exercise such jurisdiction.~~

~~(d) If the Secretary approves any petition under subsection (c), the Secretary shall notify the affected State or States of such approval and the Indian tribe concerned shall assume such jurisdiction 60 days after such notification. If the Secretary disapproves any petition under subsection (c), the Secretary shall provide such technical assistance as the Secretary determines necessary to enable the tribe to correct any deficiencies which the Secretary has identified as a cause for disapproval.~~

~~(e) Assumption of jurisdiction under this Act shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109.~~

~~MUTUAL AGREEMENTS BETWEEN STATES AND TRIBES~~

~~Sec. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care, custody, and jurisdiction over any matter within the scope of this Act, including agreements which provide for orderly transfer of jurisdiction on a case-by-case basis as provided by the tribal and State law, and agreements which provide for concurrent jurisdiction between States and Indian tribes.~~

~~(b) Such agreements may be revoked by either party upon one hundred and eighty days written notice to the~~

~~other. Such revocation shall not affect any action or proceeding over which a court has already assumed valid jurisdiction, unless the agreement provides otherwise.~~

~~EDUCATIONAL PROGAMS~~

~~SEC. 110. (a) Any home placement made by a program operated by a public or private agency which removes Indian children from a reservation with the consent of the parent or Indian custodian and places the child in a family home of a nonrelative as an incident to the child's attendance in a school located in a community in an off-reservation area shall not be deemed a child placement for purposes of this Act: *Provided*, That under the terms of the agreement with the program, the parent or Indian custodian is entitled to the return of the child upon demand.~~

~~(b) The officer, director, or operator of such program shall provide the chief executive officer of the tribe occupying the reservation from which the child is removed with the following information:~~

~~(i) the name of the child, together with age, sex, and such other basic identifying information as may be appropriate;~~

~~(ii) the name of the parent or Indian custodian and address;~~

~~(iii) identification by name, address, and telephone number of the family home in which the child is placed;~~

~~(iv) a statement from the sending agency that it undertakes to return any child in the program to its parent or Indian custodian or to make alternative arrangement for the child whenever and if the current arrangement becomes inadequate or when the parent or Indian custodian requests the return;~~

~~(v) a copy of the agreement between the parent or Indian custodian and the sending agency pursuant to which the child is received into and maintained in the educational program.~~

~~(c) The officer, director, or operator of an educational program as described in this section shall, also:~~

~~(i) notify the chief executive officer of the tribe promptly if the child is returned to his parent or Indian custodian, or is sent to another home during the school year as a part of an arrangement to provide for the child's continued participation in the program;~~

~~(ii) notify the chief executive officer of the tribe promptly upon the child's return to his parent or Indian custodian at the end of the school year;~~

~~(iii) notify the chief executive officer of the tribe at the end of the school year if the child is not returned and advise the tribe and the parent or Indian custodian of the reason for the failure to return the child.~~

~~(d) A parent or Indian custodian of a child placed by~~

~~a program under the terms of this section may request that the notice and information to the tribe required under this section not be given and such request shall constitute a waiver of the notice and information requirements in subsections (b) and (c) hereof. No such request shall be valid unless such request is fully explained to the parent or Indian custodian and is executed in writing before a notary public of the State in which the child is residing, an officer of the tribe occupying the reservation from which the child is being removed, or before two witnesses, neither of whom is a member of the program seeking the placement and at least one of whom is a member of the tribe from which the child is being removed.~~

~~(e) A failure of a program or agency or a placement family to return a child to a parent or Indian custodian upon demand as provided in this section shall constitute an unlawful placement under the terms of this Act and any parent or Indian custodian may institute proceedings in the court of the tribe occupying the reservation from which the child was removed, or any other court of competent jurisdiction to compel the immediate return of said child. In any such proceedings, all of the protections of this Act, including the notice and jurisdiction and preference provisions, shall be applicable.~~

~~(f) Nothing in this section shall be construed as limiting the right of a tribe to enact its own code of laws to govern the~~

~~operation of programs which remove Indian children from their reservations. In addition, any tribe may, by resolution of their tribal government, waive the right to receive any or all of the information provided for in this section if they so choose.~~

~~TITLE II—INDIAN CHILD AND FAMILY PROGRAMS~~

~~SEC. 201. (a) The Secretary is hereby authorized, under such rules and regulations as he may prescribe, to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations, as described in this section, and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service programs shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—~~

~~(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;~~

~~(2) the construction, operation, and maintenance of facilities described in subsection (c) hereof;~~

~~(3) family assistance, including homemaker and~~

~~home counselors, day care, after school care, and employment, recreational activities, and respite care;~~

~~(4) provision for counseling and treatment of Indian families and Indian children;~~

~~(5) home improvement programs;~~

~~(6) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;~~

~~(7) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;~~

~~(8) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and~~

~~(9) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal placement proceedings.~~

~~(b) Funds appropriated for use by the Secretary in accordance with this secton may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act or under any other Federal financial assistance program which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for~~

~~the denial or reduction of any assistance otherwise authorized under titles IV-B or XX of the Social Security Act or any other Federal assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval by an Indian tribe shall be deemed equivalent to licensing or approval by a State.~~

~~(c) Every Indian tribe is authorized to construct, operate, and maintain facilities, including but not necessarily limited to—~~

~~(1) facilities for the counseling or treatment of Indian families or individuals; and~~

~~(2) facilities for the temporary custody of Indian children.~~

~~SEC. 202. (a) The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs, as described in this section.~~

~~(b) Off-reservation Indian child and family service programs operated by Indian organizations, may include, but shall not be limited to, the following features—~~

~~(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;~~

~~(2) the construction, operation, and maintenance of facilities and services provided in section 201(c)~~;

~~(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;~~

~~(4) provision for counseling and treatment of Indian families and of Indian foster and adoptive children; and~~

~~(5) guidance, representation, and advice to Indian families involved in placement proceedings.~~

~~SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements or other cooperative arrangements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare.~~

~~(b) There are authorized to be appropriated $26,000,000 during fiscal year 1980 and such sums thereafter as may be necessary during each subsequent fiscal year in order to carry out the purposes of this title.~~

~~SEC. 204. For the purposes of section 202 and 203 of this title, the term "Indian" shall include persons defined~~

~~in section 4 (c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).~~

~~TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES~~

~~Sec. 301. (a) The Secretary is authorized and directed, under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which are affected after the date of this Act which records shall show as to each such placement the name and tribal affiliation of the child, the names and addresses of his natural parents and the Indian custodian, the names and addresses of his adoptive parents, the names and addresses of his natural siblings, and the names and location of any agency which possesses files or information concerning the placement. Such records shall not be open for inspection or copying pursuant to the Freedom of Information Act (80 Stat. 381), as amended, but information concerning a particular child shall be made available, in whole or part, as necessary to an Indian child over the age of eighteen for the purpose of identifying the court which entered his placement decree and furnishing such court with information specified in section 107 or to the adoptive parent or foster parent of an Indian child or to an Indian tribe for the purpose of assisting in the enrollment of said child in the tribe in which he is eligible for membership and for~~

~~determining any rights or benefits associated with such membership. The records collected by the Secretary pursuant to this section shall be privileged and confidential and shall be used only for the specific purposes set forth in this Act.~~

~~(b) A copy of any court document which affects or approves the placement of an Indian child within the coverage of this Act shall be filed with the Secretary by mailing a certified copy of said order within ten days from the date such order is issued. In addition, a court or agency which possesses files or information concerning a placement shall file with the Secretary any further information which the Secretary may require in order to fulfill his recordkeeping functions under this Act.~~

~~SEC. 202. (a) The Secretary is authorized to perform any and all acts and to make rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act.~~

~~(b) (1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest agencies in the consideration and formation of rules anad regulations to implement the provisions of this Act.~~

~~(2) Within seven months from the date of this Act, Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United~~

~~States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives~~.

~~(3) Within eight months from the date of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties~~.

~~(4) Within ten months from the date of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act~~.

~~(c) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules and regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives and shall, to the extent practicable, consult with the tribes, organizations, and agencies specified in subsection (b)(1) of this section, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and to receive comments from, other interested parties~~.

~~TITLE IV—PLACEMENT PREVENTION STUDY~~

~~SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools contributes to the breakup of Indian families and denies Indian children the equal protection of the law~~.

~~(b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within one year from the date of this Act, a plan, including a cost analysis statement, for the provision to Indian children of schools located near the student's home. In developing this plan, the Secretary shall give priority to the need for educational facilities for children in the elementary grades~~.

That this Act may be cited as the "Indian Child Welfare Act of 1978".

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

*(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with*

Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibility and legal obligations to the American Indian people, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership

in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697), as amended;

(9) "parent" means any biological parent or par-

ents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code. In any case where it has been judicially determined that a reservation has been diminished or the boundaries disestablished, the term shall include the lands within the last recognized boundaries of such diminished reservation prior to enactment of the statute which resulted in the diminishment or disestablishment;

(11) "Secretary" means the Secretary of the Interior: and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding *involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.*

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe. absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to In-

dian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint coun-

sel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the

consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so

long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in paragraph (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

SEC. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, or biological parent or prior Indian custodian may petition for return of custody and the court shall grant such *petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.*

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Sec. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Sec. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe *shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.*

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population on homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as

provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party

upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or *harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement continues only for a reasonable time and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.*

SEC. 113. None of the provisions of this title, except section 101(a), shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody *of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—*

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation, and maintenance of

facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

Sec. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended.

Sec. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (80 Stat. 381).

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose

such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

SEC. 302. (a)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest groups in the consideration and formulation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives.

(3) Within eight months from the date of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.

(b) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: Provided, That prior to any revisions or amendments to such rules and regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives and shall, to the extent practicable, consult with tribes, organizations, and groups specified in subsection (b)(1) of this section, and shall publish any proposed revisions or amendments in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and to receive comments from, other interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility

of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provisions of educational facilities for children in the elementary grades.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Appendix F

S 1214

Calendar No. 550

95TH CONGRESS
1ST SESSION

S. 1214

[Report No. 95–597]

A BILL

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

By Mr. ABOUREZK, Mr. HUMPHREY, Mr. McGOVERN, Mr. HASKELL, and Mr. BURDICK

APRIL 1 (legislative day, FEBRUARY 21), 1977

Read twice and referred to the Select Committee on Indian Affairs

NOVEMBER 3 (legislative day, NOVEMBER 1), 1977

Reported with an amendment

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Calendar No. 550

95th CONGRESS
1st Session

S. 1214

[Report No. 95-597]

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IN THE SENATE OF THE UNITED STATES

April 1 (legislative day, February 21), 1977

Mr. Abourezk (for himself, Mr. Humphrey, Mr. McGovern, Mr. Haskell, and Mr. Burdick) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

November 3 (legislative day, November 1), 1977

Reported by Mr. Abourezk, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That this Act may be cited as the "Indian Child Welfare Act of 1977".~~

~~FINDINGS~~

~~Sec. 2. Recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people, the Congress finds that:~~

~~(a) An alarmingly high percentage of Indian children, living within both urban communities and Indian reservations, are separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies and are placed in institutions (including boarding schools), or in foster or adoptive homes, usually with non-Indian families.~~

~~(b) The separation of Indian children from their biological families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand the nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the Government officials involved are unfamiliar with, and often disdainful of, Indian culture and society; (4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and (5) responsible tribal authorities are not consulted about or even informed of the nontribal government actions.~~

~~(c) The separation of Indian children from their natural parents, including especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self esteem, and contributes directly to the unreasonably high rates among~~

~~Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For Indians generally, the child placement activities of nontribal government agencies undercut the continued existence of tribes as self-governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.~~

~~DECLARATION OF POLICY~~

~~SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, to discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, to assist Indian tribes in the operation of tribal family development programs, and generally to promote the stability and security of Indian family life.~~

DEFINITIONS

~~SEC. 4. For purposes of this Act:~~

~~(a) "Secretary", unless otherwise designated, means the Secretary of the Interior.~~

~~(b) "Indian" means any person who is a member of, or who is eligible for membership in, a federally recognized Indian tribe, as defined in subsection (c) hereof.~~

~~(c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native region, village, or group as defined in the Alaska Native Claims Settlement Act (85 Stat 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.~~

~~(d) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned and controlled by Indians, or a majority of whose members are Indians.~~

~~(e) "Tribal court" means the Court of Indian Offenses, any court operated and maintained by an Indian tribe, and any other tribunal which performs judicial functions in the name of an Indian tribe within an Indian reservation.~~

~~(f) "Nontribal government agency" means any Federal, State or local government department, bureau, agency, or other office, including any court, and any private agency licensed by a State or local government, which has jurisdiction or which performs functions and exercises responsibilities in the fields of social services, welfare, and domestic relations, including child placement.~~

~~(g) "Child placement" means any proceedings, judicial, quasi-judicial, or administrative, voluntary or involuntary, and public or private, under which an Indian child is removed from the custody of his natural parent or parents, his Indian adoptive parent or parents, or the custody of any blood relative in whose care he has been left by his natural parent or parents, or his Indian adoptive parent or parents, and is either offered for adoption or is placed in a foster home or other institution.~~

~~(h) "Natural parent" means the biological parent of a child and also any Indian who has adopted a child.~~

~~(i) "Blood relative" means any grandparent, aunt or uncle (whether by blood or marriage), brother or sister, brother or sister-in-law, niece or nephew, or stepparent, whether by blood, marriage, or adoption, over the age of eighteen or otherwise emancipated, or as defined by tribal law or custom.~~

~~TITLE I—CHILD PLACEMENT STANDARDS~~

~~SEC. 101. (a) In the case of any Indian child who resides within an Indian reservation, no child placement shall be valid or given any legal force and effect, except temporary placements after emergency removal under circumstances where the physical or emotional well-being of the child is immediately threatened, unless made pursuant to an order of the tribal court, where a tribal court exists~~

~~(b) "Indian" means any person who is a member of, or who is eligible for membership in, a federally recognized Indian tribe, as defined in subsection (c) hereof.~~

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~~within such reservation which exercises jurisdiction over child welfare matters and domestic relations.~~

~~(b) In the case of any Indian child who is domiciled within an Indian reservation, or who resides within an Indian reservation which does not have a tribal court, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless the Indian tribe occupying such reservation has been accorded thirty days' written notice of, and a right to intervene as an interested party in, the child placement proceedings. For the purposes of this Act, an Indian child shall be deemed to be domiciled where his natural parent or parents, or the blood relative in whose care he may have been left by his natural parent or parents, is domiciled.~~

~~(c) In the case of any Indian child who is not a resident or domiciliary of an Indian reservation, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless the Indian tribe of which the child is a member, or is eligible for membership, has been accorded thirty days' written notice of, and a right to intervene as an interested party in, the child placement proceedings.~~

~~(d) No Indian child shall be removed from the custody of his natural parent or parents, Indian adoptive parent or parents, or blood relative in whose custody the child has been placed by the private actions of any private individual, corporation, group, or institution for a period of more than thirty days without written notice served upon the tribe of which the child is a member or is eligible for membership in or upon whose reservation the child resides or is domiciled. The notice shall be in writing signed or acknowledged by the child's natural parent or parents, Indian adoptive parent or parents, or blood relative, and the child's temporary guardian, notarized or signed by two witnesses, stating the names of all the parties, their addresses, the expected length of removal, the purpose of removal, and the extent to which custody over the child is transferred to the temporary guardian. This section shall not apply if the tribe has enacted or enacts its own law governing private placements. No placement shall be valid or given any legal force and effect if made in violation of this section.~~

~~(e) It shall be the duty of the party seeking a change of the custody of an Indian child to notify the revelant tribal governing body by mailing written notice to the chief executive officer or such other person as the tribe may designate: *Provided further*, That the judge or hearing officer at any child placement proceeding shall make a good faith deter-~~

~~mination of whether the child involved is Indian and, if so, which tribe must be notified.~~

~~SEC. 102. (a) No placement of an Indian child, except as provided in section 101 (d) of this Act, shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless (1) his natural parent or parents, or the blood relative in whose care the child may have been left by his natural parent or parents, has been accorded thirty days' written notice of the child placement proceedings and a right (A) to intervene in the proceedings as an interested party through counsel or, alternatively, in a tribal court, through a lay advocate, (B) to submit evidence and present witnesses on his or her own behalf, and (C) to examine all reports or other documents and files upon which any decision with respect to child placement may be based; and (2) the nontribal government agency seeking to effect the child placement affirmatively shows that alternative remedial services and rehabilitative programs designed to prevent the break-up of the Indian family have been made available and proved unsuccessful.~~

~~(b) Where the natural parent or parents of an Indian child, who fall within any of three classes mentioned in section 101 of this Act, or the blood relative in whose care the child may have been left by his natural parent or parents,~~

~~oppose the loss of custody, no child placement shall be valid or given any legal force and effect in the absence of a determination, supported by an overwhelming weight of the evidence, including testimony by qualified professional witnesses, that the continued custody of the child by his natural parent or parents, or the blood relative in whose care the child has been left, will result in serious emotional damage, or in the absence of a determination, supported by clear and convincing evidence, including testimony by a qualified physician, that the continued custody of the child by his natural parent or parents, or the blood relative in whose care the child has been left, will result in serious physical damage. In making such determinations, poverty, including inadequate or crowded housing, misconduct, and alcohol abuse on the part of either natural parent, or the blood relative, shall not be deemed prima facie evidence that serious physical or emotional damage to the child has occurred or will occur. The standard to be applied in any proceeding covered by this Act shall be the standards of the Indian community in which the natural parent or parents, Indian adoptive parent or parents, or blood relatives reside.~~

~~(c) In the event that the natural parent or parents or Indian adoptive parent or parents of an Indian child consent to the loss of custody, whether temporary or permanent, no child placement shall be valid or given any legal force and~~

~~effect, unless such consent is voluntary, in writing, executed before a judge of a court having jurisdiction over child placements, and accompanied by the witnessing judge's certificate that the consent was explained in detail, was translated into the natural parent's native language, and was fully understood by him or her. If the consent is to a nonadoptive child placement, the natural parent or parents or Indian adoptive parent or parents may withdraw the consent at any time for any reason, and the consent shall be deemed for all purposes, except temporary custody, as having never been given. If the consent is to an adoptive child placement, and the child is over the age of two, the natural parent or parents or Indian adoptive parent or parents may withdraw the consent for any reason at any time before the final decree of adoption: *Provided further*, That no final decree of adoption may be entered within ninety days after the natural parent or parents, Indian adoptive parent or parents, or blood relative has given consent to the adoption. A final decree of adoption may be set aside only upon a showing that the child is again being placed for adoption, that the adoption did not comply with the requirements of this Act or was otherwise unlawful, or that the consent to the adoption was not voluntary. Consent by the natural parent or parents of an Indian child given within ninety days of the birth of the child shall be presumed to be involuntary.~~

~~(d) No placement of an Indian child, except as provided by section 101 (d) of this Act, shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless the child has been represented in the placement proceedings by counsel or, alternatively, in a tribal court, by a lay advocate, and unless his natural parent or parents, Indian adoptive parent or parents, or the blood relative in whose care the child may have been left by his natural parent or parents, or Indian adoptive parent or parents, has been represented by separate counsel or lay advocate.~~

~~SEC. 103. (a) In offering for adoption an Indian child, every nontribal government agency shall grant a preference to members of the child's extended Indian family, which shall be defined by tribal law or custom.~~

~~(b) In otherwise placing an Indian child, every nontribal government agency, in the absence of good cause shown to the contrary, shall grant preferences in the following order: (1) to the child's extended Indian family, (2) to a foster home, if any, licensed or otherwise designated by the Indian tribe occupying the reservation of which the child is a resident or domiciliary; (3) to a foster home, if any, licensed by the Indian tribe of which the child is a member or is eligible for membership; (4) to any other~~

~~foster home within an Indian reservation which is recommended by the Indian tribe of which the child is a member or is eligible for membership; (5) to any foster home run by an Indian family; and (6) to a custodial institution for children operated by an Indian tribe, a tribal organization or nonprofit Indian organization: *Provided, however,* That each Indian tribe may modify or amend the foregoing order of preferences, and may add or delete preference categories, by resolution of its government body. Every nontribal government agency shall maintain a record evidencing its efforts to comply with the order of preferences provided under this subsection in each case of an Indian child placement.~~

~~(c) Where an Indian child is placed in a foster or adoptive home, or in an institution, outside the reservation of which the child is a resident, pursuant to an order of a tribal court, the tribal court shall retain continuing jurisdiction over such child placement until the child attains the age of eighteen.~~

~~Sec. 104. After an Indian adoptive child attains the age of eighteen, upon his or her application to the court which entered the final adoption decree, and in the absence of good cause shown to the contrary, the child shall have a right to learn the names and last known address of his natural parent or parents and siblings who also have attained the age of~~

~~eighteen, their tribal affiliation and the grounds for the severance of their family relations.~~

~~SEC. 105. In any proceeding within the jurisdiction of this Act the United States, any Indian Reservation, State, Commonwealth, territory, or possession thereof shall give full faith and credit to the laws of any Indian tribe involved in a proceeding under the Act and any Tribal Court orders issued in such proceeding.~~

~~TITLE II—INDIAN FAMILY DEVELOPMENT~~

~~SEC. 201. (a) The Secretary is hereby authorized, under such rules and regulations as he may prescribe, to make grants to, or enter into contracts with, Indian tribes for the purpose of assisting such tribes in the establishment and operation of Indian family development programs, as described in section 202, and in the preparation and implementation of child welfare codes.~~

~~(b) The Secretary is further authorized, under such rules and regulations as he may prescribe, to carry out, or to make grants to or contracts with Indian tribes to carry out, a special home improvement program to upgrade: (1) the housing conditions of Indian foster and adoptive parents, if such housing conditions are substandard; (2) the housing conditions of Indians who seek Indian foster or adoptive children, where improved housing would enable such In-~~

~~dians to qualify as foster or adoptive parents under tribal law or regulations; and (3) the housing conditions of Indian families facing disintegration, where improved housing would contribute significantly to family stability.~~

~~(c) The Secretary is also authorized, under such rules and regulations as he may prescribe to carry out, or to make grants to or contracts with Indian organizations to carry out, off-reservation Indian family development programs, as described in section 203. In the establishment, operation, and funding of off-reservation Indian family development programs, the Secretary may enter into agreements or other cooperative arrangements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare.~~

~~(d) There are authorized to be appropriated $21,700,000 during fiscal year 1978, $23,700,000 during fiscal year 1979, $25,100,000 during fiscal year 1980, and such sums as may be necessary during each subsequent fiscal year in order to carry out the purposes of this section.~~

~~SEC. 202. (a) Every Indian tribe is hereby authorized to establish and operate an Indian family development program, which program may include some or all of the following features:~~

~~(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;~~

~~(2) the construction, operation, and maintenance of family development centers, as defined in subsection (c) (2) hereof;~~

~~(3) family assistance, including homemakers and home counselors, day care, after school care and employment, recreational activities, and respite services;~~

~~(4) provision for counseling Indian families and Indian children;~~

~~(5) a special home improvement program, as defined in section 201 (b);~~

~~(6) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;~~

~~(7) education and training of Indians, including tribal court judges and staff, in skills relating to child welfare and family assistance programs, and the granting of scholarships for such education and training; and~~

~~(8) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children.~~

~~(b) Where an Indian tribe has implemented a licensing or other regulatory system pursuant to subsection 202 (a) (1), any Indian foster or adoptive home so~~

~~licensed or designated (1) may accept Indian child placements by a nontribal government agency and State funds in support of Indian children, (2) shall have a first preference in the placement of an Indian child who is a resident or domiciliary of such tribe's reservation in accordance with subsection 103 (b) (1) of this Act, and (3) shall have a second preference in the placement of an Indian child who is a member of, or eligible for membership in, such tribe in accordance with subsection 103 (b) (2) of this Act.~~

~~(c) (1) The objective of every Indian family development program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his natural parent or parents, or the custody of any blood relative in whose care he has been left by his natural parent or parents, by a tribal court or nontribal government agency shall be effected only as a last resort.~~

~~(2) In furtherance of this objective, every Indian tribe is authorized to construct, operate, and maintain a family development center which may contain, among other features:~~

~~(A) facilities for counseling Indian families which face disintegration and, where appropriate, for the treatment of individual family members~~;

~~(B) facilities for the temporary custody of Indian~~

~~children whose natural parent or parents are temporarily unable or unwilling to care for them or who otherwise are left temporarily without adequate adult supervision by a blood relative; and~~

~~(C) facilities for the temporary custody of Indian parents, where so ordered by a tribal court, in lieu of incarceration for public intoxication or the commission of any other minor offense.~~

~~Sec. 203. Off-reservation Indian family development programs, operated either directly by the Secretary or through grants and contracts with local Indian organizations, may include, but shall not be limited to, the following features:~~

~~(a) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;~~

~~(b) the construction, operation, and maintenance of family development centers providing the facilities and services set forth in paragraphs (2) (A) and (B) of section 202(c) of this Act;~~

~~(c) family assistance, including homemakers and home counselors, day care, after school care and employment, recreational activities, and respite services;~~

~~(d) provision for counseling and treatment both of~~

~~Indian families which face disintegration and, where appropriate, of Indian foster and adoptive children;~~

~~(e) an Indian child defense program, as defined in section 204(b), and other representation of Indian children before the courts; and~~

~~(f) furnishing guidance, representation, and advice to Indian families involved in child placement proceedings before nontribal government agencies.~~

~~SEC. 204. (a) The Secretary is hereby authorized and directed, under such rules and regulations as he may prescribe, to undertake a study of the circumstances surrounding all child placements which have occurred during the sixteen years preceding the effective date of this Act, where the Indian child so placed still is under the age of eighteen on such date. If the Secretary has good cause to believe, on the basis of this study, that a child placement was or may be invalid or otherwise legally defective, and if either natural parent, Indian adoptive parent or the blood relative previously having custody of the Indian child so requests, the Secretary is authorized, in his discretion, to institute a habeas corpus action or other appropriate legal proceeding in the name of the United States on behalf of such parent, Indian adoptive parent or blood relative in the United States district court for the district in which the child resides for the purpose of challenging the child placement and, if it is found~~

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~~invalid or legally defective, of restoring custody of the Indian child to its natural parent or parents, Indian adoptive parent or parents, or to the blood relative in whose care the child had been left.~~

~~(b) The Secretary is further authorized and directed, under such rules and regulations as he may prescribe, to operate, or to make grants or contracts with Indian tribes or Indian organizations to operate, an Indian family defense program which shall provide representation by an attorney or, alternatively, in a tribal court, by a lay advocate for any Indian child who is the subject of a child placement proceeding, or, if appropriate, for his natural parent or parents, or the blood relative in whose care the child may have been left by his natural parent or parents.~~

~~(c) The Secretary also is authorized and directed, under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which either are effected after the date of this Act or are the subject of the study required under subsection (a) hereof, which records shall show as to each such placement the name and tribal affiliation of the child, the names and addresses of his natural parents and the blood relative, if any, in whose care he may have been left by a natural parent, the names and addresses of his siblings, and the names and locations of any tribal court~~

~~or nontribal government agency which possesses files or information concerning his placement. Such records shall not be open for inspection or copying pursuant to the Freedom of Information Act (80 Stat. 381), as amended, but information concerning a particular child placement shall be made available in whole or in part, as necessary: (1) to an Indian adoptive child over the age of eighteen for the purpose of identifying the court which entered his final adoption decree and furnishing such court with the information specified in section 104; (2) to the adoptive parent of an Indian child or to an Indian tribe for the purpose of assisting in the enrollment of an Indian adoptive child in the tribe of which he is eligible for membership; and (3) to the adoptive parent of an Indian child for the purpose of establishing or continuing his tribal affiliation or a relationship with his siblings. The records collected by the Secretary pursuant to this section shall be privileged and confidential and shall be used only for the specific purposes set forth in this Act.~~

~~(d) There are authorized to be appropriated $18,000,000 during fiscal year 1979, $20,000,000 during fiscal year 1980, $22,000,000 during fiscal year 1981, and such sums as may be necessary during each subsequent fiscal year in order to carry out the purposes of this section, including the payment of attorney fees.~~

~~Sec. 205. (a) The Secretary is authorized to perform~~

~~any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this Act.~~

~~(b)(1) Within six months from the date of enactment of this Act, the Secretary shall consult with Indian tribes, Indian organizations and Indian interest agencies in the consideration and formulation of rules and regulations to implement the provisions of this Act.~~

~~(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively.~~

~~(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.~~

~~(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.~~

~~(c) The Secretary is authorized to revise and amend any rules or regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules or regulations, the Secretary shall present the~~

~~proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively; and shall, to the extent practicable, consult with the tribes, organizations, and agencies specified in subsection (b) (1) of this section, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.~~

That this Act may be cited as the "Indian Child Welfare Act of 1977".

FINDINGS

Sec. 2. Recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people, the Congress finds that:

(a) An alarmingly high percentage of Indian children living within both urban communities and Indian reservations, are separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies and are placed in institutions (including boarding schools), or in foster or adoptive homes, usually with non-Indian families.

(b) The separation of Indian children from their families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand the nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the agency officials involved are unfamiliar with, and often disdainful of Indian culture and society; (4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and (5) responsible tribal authorities are not consulted about or even informed of the nontribal government actions.

(c) The separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggrevates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For Indians generally, the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-

governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.

DECLARATION OF POLICY

Sec. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.

DEFINITIONS

Sec. 4. For purposes of this Act:

(a) "Secretary", unless otherwise designated, means the Secretary of the Interior.

(b) "Indian" means any person who is a member of or who is eligible for membership in a federally recognized Indian tribe.

(c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided by the Bureau of Indian Affairs to Indians because of their status as

Indians, including any Alaska Native villages, as listed in section 11(b)(1) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697).

(d) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(e) "Tribal court" means any Court of Indian Offenses, any court established, operated, and maintained by an Indian tribe, and any other administrative tribunal of a tribe which exercise jurisdiction over child welfare matters in the name of a tribe.

(f) "Nontribal public or private agency" means any Federal, State, or local government department, bureau, agency, or other office, including any court other than a tribal court, and any private agency licensed by a State or local government, which has jurisdiction or which performs functions and exercises responsibilities in the fields of social services, welfare, and domestic relations, including child placement.

(g) "Reservation" means Indian country as defined in section 1151 of title 18, United States Code and as used in this Act, shall include lands within former reservations where the tribes still maintain a tribal government, and lands held by Alaska Native villages under the provisions of the Alaska

Native Claims Settlement Act (85 Stat. 688). In a case where it has been judicially determined that a reservation has been diminished, the term "reservation" shall include lands within the last recognized boundaries of such diminished reservation prior to enactment of the allotment or pending statute which caused such diminishment.

(h) "Child placement" means any proceedings, judicial, quasi-judicial, or administrative, voluntary or involuntary, and public or private action(s) under which an Indian child is removed by a nontribal public or private agency from (1) the legal custody of his parent or parents, (2) the custody of any extended family member in whose care he has been left by his parent or parents, or (3) the custody of any extended family member who otherwise has custody in accordance with Indian law or custom, or (4) under which the parental or custodial rights of any of the above mentioned persons are impaired.

(i) "Parent" means the natural parent of an Indian child or any person who has adopted an Indian child in accordance with State, Federal, or tribal law or custom.

(j) "Extended family member" means any grandparent, aunt, or uncle (whether by blood or marriage), brother or sister, brother or sister-in-law, niece or nephew, first or second cousin, or stepparent whether by blood, or adoption, over the age of eighteen or otherwise emancipated, or as defined by tribal law or custom.

TITLE I—CHILD PLACEMENT JURISDICTION AND STANDARDS

SEC. 101. (a) No placement of an Indian child, except as provided in this Act shall be valid or given any legal force and effect, except temporary placement under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless (1) his parent or parents and the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody according to tribal law or custom, has been accorded not less than thirty days prior written notice of the placement proceeding, which shall include an explanation of the child placement proceedings, a statement of the facts upon which placement is sought, and a right: (A) to intervene in the proceedings as an interested party; (B) to submit evidence and present witnesses on his or her own behalf; and (C) to examine all reports or other documents and files upon which any decision with respect to child placement may be based; and (2) the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been made available and proved unsuccessful.

(b) Where the natural parent or parents of an Indian child who falls within the provisions of this Act, or the

extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, opposes the loss of custody, no child placement shall be valid or given any legal force and effect in the absence of a determination, supported by clear and convincing evidence, including testimony by qualified expert witnesses, that the continued custody of the child by his parent or parents, or the extended family member in whose care the child has been left, or otherwise has custody in accordance with tribal law or custom, will result in serious emotional or physical damage. In making such determination, proverty, crowded or inadequate housing, alcohol abuse or other nonconforming social behaviors on the part of either parent or extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, shall not be deemed prima facie evidence that serious physical or emotional damage to the child has occurred or will occur. The standards to be applied in any proceeding covered by this Act shall be the prevailing social and cultural standards of the Indian community in which the parent or parents or extended family member resides or with which the parent or parents or extended family member maintains social and cultural ties.

(c) In the event that the parent or parents of an

Indian child consent to a child placement, whether temporary or permanent, such placement shall not be valid or given any legal force and effect, unless such consent is voluntary, in writing, executed before a judge of a court having jurisdiction over child placements, and accompanied by the witnessing judge's certificate that the consent was explained in detail, was translated into the parent's native language, and was fully understood by him or her. If the consent is to a nonadoptive child placement, the parent or parents may withdraw the consent at any time for any reason, and the consent shall be deemed for all purposes as having never been given. If the consent is to an adoptive child placement, the parent or parents may withdraw the consent for any reason at any time before the final decree of adoption: Provided, That no final decree of adoption may be entered within ninety days after the birth of such child or within ninety days after the parent or parents have given written consent to the adoption, whichever is later. Consent by the parent or parents of an Indian child given during pregnancy or within ten days after the birth of the child shall be conclusively presumed to be involuntary. A final decree of adoption may be set aside upon a showing that the child is again being placed for adoption, that the adoption did not comply with the requirements of this Act or was otherwise unlawful, or that the consent to the adoption *was not voluntary. In the case of such a failed adoption, the parent or parents or the extended family member from whom custody was taken shall be afforded an opportunity to reopen the proceedings and petition for return of custody. Such prior parent or custodian shall be given thirty days notice of any proceedings to set aside or vacate a previous decree unless the prior parent or custodian waives in writing any right to such notice.*

(d) No placement of an Indian child, except as otherwise provided by this Act, shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless his parent or parents, or the extended family member in whose care the child may have been left or who otherwise has custody in accordance with tribal law or custom, has been afforded the opportunity to be represented by counsel or lay advocate as required by the court having jurisdiction.

(e) Whenever an Indian child previously placed in foster care or temporary placement by any nontribal public or private agency is committed or placed, either voluntarily or involuntarily in any public or private institution, including but not limited to a correctional facility, institution for juvenile delinquents, mental hospital or halfway house, or is transferred from one foster home to another, notification

shall forthwith be made to the tribe with which the child has significant contacts and his parent or parents or extended family member from whom the child was taken. Such notice shall include the exact location of the child's present placement and the reasons for changing his placement. Notice shall be made thirty days before the legal transfer of the child effected, if possible, and in any event within ten days thereafter.

Sec. 102. (a) In the case of any Indian child who resides within an Indian reservation which maintains a tribal court which exercises jurisdiction over child welfare matters, no child placement shall be valid or given any legal force and effect, unless made pursuant to an order of the tribal court. In the event that a duly constituted Federal or State agency or any representation thereof has good cause to believe that there exists an immediate threat to the emotional or physical well-being of an Indian child, such child may be temporarily removed from the circumstances giving rise to the danger provided that immediate notice shall be given to the tribal authorities, the parents, and the extended family member in whose care the child may have been left or who otherwise has custody according to tribal law or custom. Such notice shall include the child's exact whereabouts and the precise reasons for removal. Temporary removals beyond the boundaries of a reservation shall not affect the exclusive *jurisdiction of the tribal court over the placement of an Indian child.*

(b) In the case of an Indian child who resides within an Indian reservation which possesses but does not exercise jurisdiction over child welfare matters, no child placement, by any nontribal public or private agency shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless such jurisdiction is transferred to the State pursuant to a mutual agreement entered into between the State and the Indian tribe pursuant to subsection (j) of this section. In the event that no such agreement is in effect, the Federal agency or agencies servicing said reservation shall continue to exercise responsibility over the welfare of such child.

(c) In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a State, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless the Indian tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party

in the child placement proceedings. In the event that the intervening tribe maintains a tribal court which has jurisdiction over child welfare matters, jurisdiction shall be transferred to such tribe upon its request unless good cause for refusal is affirmatively shown.

(d) In the event of a temporary placement or removal as provided in subsections (a), (b), and (c) above, immediate notice shall be given to the parent or parents, the custodian from whom the child was taken if other than the parent or parents, and the chief executive officer or such other person as such tribe or tribes may designate for receipt of notice. Such notice shall include the child's exact whereabouts, the precise reasons for his or her removal, the proposed placement plan, if any, and the time and place where hearings will be held if a temporary custody order is to be sought. In addition, where a tribally operated or licensed temporary child placement facility or program is available, such facilities shall be utilized. A temporary placement order must be sought at the next regular session of the court having jurisdiction and in no event shall any temporary or emergency placement exceed seventy-two hours without an order from the court of competent jurisdiction.

(e) For the purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents, or the extended family member in whose care he

may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, is resident.

(f) For the purposes of this Act, whether or not a nonreservation resident Indian child has significant contacts with an Indian tribe shall be an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship. A finding that such Indian child does not have significant contacts with an Indian tribe sufficient to warrant a transfer of jurisdiction to a tribal court under subsection (c) of this section does not waive the preference standards for placement set forth in section 103 of this Act.

(g) It shall be the duty of the party seeking a change of the legal custody of an Indian child to notify the parent or parents, the extended family members from whom custody is to be taken, and the chief executive of any tribe or tribes with which such child has significant contacts by mailing prior written notice by registered mail to the parent or parents, or extended family member, and the chief executive officer of the tribe, or such other persons as such tribe or

tribes may designate: Provided, That the judge or hearing officer at any child placement proceeding shall make a good faith determination of whether the child involved is Indian and, if so, whether the tribe or tribes with which the child has significant contacts were timely notified.

(h) Any program operated by a public or private agency which removes Indian children from a reservation area and places them in family homes as an incident to their attendance in schools located in communities in off-reservation areas and which are not educational exemptions as defined in the Interstate Compact on the Placement of Children shall not be deemed child placements for the purposes of this Act. Such programs shall provide the chief executive officer of said tribe with the same information now provided to sending and receiving states which are members of the Interstate Compact on the Placement of Children. This notification shall be facilitated by mailing written notice by registered mail to the chief executive officer or other such person as the tribe may designate.

(i) Notwithstanding the Act of August 15, 1953 (67 Stat. 588), as amended, or any other Act under which a State has assumed jurisdiction over child welfare of any Indian tribe, upon sixty days written notice to the State in which it is located, any such Indian tribe may reassume the same jurisdiction over such child welfare matters as any

other Indian tribe not affected by such Acts: Provided, That such Indian tribe shall first establish and provide mechanisms for implementation of such matters which shall be subject to the review and approval of the Secretary of the Interior. In the event the Secretary does not approve the mechanisms which the tribe proposes within sixty days, the Secretary shall provide such technical assistance and support as may be necessary to enable the tribe to correct any deficiencies which he has identified as a cause for disapproval. Following approval by the Secretary, such reassumption shall not take effect until sixty days after the Secretary provides notice to the State which is asserting such jurisdiction. Except as provided in section 102(c), such reassumption shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such actions or proceeding shall abate by reason of such reassumption.

(j) States and tribes are specifically authorized to enter into mutual agreements or compacts with each other, respecting the care, custody, and jurisdictional authority of each party over any matter within the scope of this Act, including agreements which provide for transfer of jurisdiction on a case-by-case basis, and agreements which provide for concurrent jurisdiction between the States and the tribes. The provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat.

78) shall not limit the powers of States and tribes to enter into such agreements or compacts. Any such agreements shall be subject to revocation by either party upon sixty days written notice to the other. Except as provided in section 102(c), such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such action or proceeding shall abate by reason of such revocation: And provided further, That such agreements shall not waive the rights of any tribe to notice and intervention as provided in this Act nor shall they alter the order of preference in child placement provided in this title. The Secretary of the Interior shall have sixty days after notification to review any such mutual agreements or compacts or any revocation thereof and in the absence of a disapproval for good cause shown, such agreement, compact, or revocation thereof shall become effective.

(k) Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act.

SEC. 103. (a) In offering for adoption an Indian child, in the absence of good cause shown to the contrary, a preference shall be given in the following order: (1) to the child's extended family; (2) to an Indian home on the reservation where the child resides or has significant contacts; (3) to an

Indian home where the family head or heads are members of the tribe with which the child has significant contacts; and (4) to an Indian home approved by the tribe: Provided, however, That each Indian tribe may modify or amend the foregoing order of preference and may add or delete preference categories by resolution of its government.

(b) In any nonadoptive placement of an Indian child, every nontribal public or private agency, in the absence of good cause shown to the contrary, shall grant preferences in the following order: (1) to the child's extended family; (2) to a foster home, if any, licensed or otherwise designated by the Indian tribe occupying the reservation of which the child is a resident or with which the child has significant contacts; (3) to a foster home, if any, licensed by the Indian tribe of which the child is a member or is eligible for membership; (4) to any other foster home within an Indian reservation which is approved by the Indian tribe of which the child is a member or is eligible for membership in or with which the child has significant contacts; (5) to any foster home run by an Indian family; and (6) to a custodial institution for children operated by an Indian tribe, a tribal organization, or nonprofit Indian organization: Provided, however, That each Indian tribe may modify or amend the 'foregoing order of preferences, and may add or delete preference categories, by resolution of its government body.

(c) Every nontribal public or private agency shall mantain a record evidencing its efforts to comply with the order of preference provided under subsections (a) and (b) in each case of an Indian child placement. Such records shall be made available, at any time upon request of the appropriate tribal government authorities.

(d) Where an Indian child is placed in a foster or adoptive home, or in an institution, outside the reservation of which the child is a resident or with which he maintains significant contacts, pursuant to an order of a tribal court, the tribal court shall retain continuing jurisdiction over such child until the child attains the age of eighteen.

SEC. 104. In order to protect the unique rights associated with an individual's membership in an Indian tribe, after an Indian child who has been previously placed attains the age of eighteen, upon his or her application to the court which entered the final placement decree, and in the absence of good cause shown to the contrary, the child shall have the right to learn the tribal affiliation of his parent or parents and such other information as may be necessary to protect the child's rights flowing from the tribal relationship.

SEC. 105. In any child placement proceeding within the scope of this Act, the United States, every State, every territory or possession of the United States, and every

Indian tribe shall give full faith and credit to the laws of any Indian tribe applicable to a proceeding under the Act and to any tribal court orders relating to the custody of a child who is the subject of such a proceeding.

TITLE II—INDIAN FAMILY DEVELOPMENT

SEC. 201. (a) The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to carry out or make grants to Indian tribes and Indian organizations for the purpose of assisting such tribes or organizations in the establishment and operation of Indian family development programs on or near reservations, as described in this section, and in the preparation and implementation of child welfare codes. The objective of every Indian family development program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or parents, or the custody of any extended family member in whose care he has been left his parent or parents, or one who otherwise has custody according to tribal law or custom, shall be effected only as a last resort. Such family development programs may include, but are not limited to, some or all of the following features:

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance

of family development centers, as defined in subsection (b) hereof;

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment of Indian families and Indian children;

(5) home improvement programs;

(6) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(7) education and training of Indians, including tribal court judges and staff, in skills relating to child welfare and family assistance programs;

(8) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(9) guidance, legal representation, and advice to Indian families involved in tribal or nontribal child placement proceedings.

(b) Any Indian foster or adoptive home licensed or designated by a tribe (1) may accept Indian child placements by a nontribal public or private agency and State funds in support of Indian children; and (2) shall be granted preference in the placement of an Indian child in

accordance with title I of this Act. For purposes of qualifying for assistance under any federally assisted program, licensing by a tribe shall be deemed equivalent to licensing by a State.

(c). Every Indian tribe is authorized to construct, operate, and maintain a family development center which may contain, but shall not be limited to—

(1) facilities for counseling Indian families which face disintegration and, where appropriate, for the treatment of individual family members;

(2) facilities for the temporary custody of Indian children whose natural parent or parents, or extended family member in whose care he has been left by his parent or parents or one who otherwise has custody according to tribal law or custom, are temporarily unable or unwilling to care for them or who otherwise are left temporarily without adequate adult supervision by an extended family member.

Sec. 202. (a) The Secretary is also authorized under such rules and regulations as he may prescribe to carry out, or to make grants to Indian organizations to carry out, off-reservation Indian family development programs, as described in this section.

(b) Off-reservation Indian family development programs operated through grants with local Indian organiza-

tions, may include, but shall not be limited to, the following features:

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation, and maintenance of family development centers providing the facilities and services set forth in section 201(d);

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment both of Indian families which face disintegration and, where appropriate, of Indian foster and adoptive children; and

(5) guidance, representation, and advice to Indian families involved in child placement proceedings before nontribal public and private agencies.

Sec. 203. (a) In the establishment, operation, and funding of Indian family development programs, both on or off reservation, the Secretary may enter into agreements or other cooperative arrangements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby *authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare.*

(b) There are authorized to be appropriated $26,000,000 during fiscal year 1979 and such sums thereafter as may be necessary during each subsequent fiscal year in order to carry out the purposes of this title.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) The Secretary of the Interior is authorized and directed under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which are effected after the date of this Act which records shall show as to each such placement the name and tribal affiliation of the child, the names and addresses of his natural parents and the extended family member, if any, in whose care he may have been left, the names and addresses of his adoptive parents, the names and addresses of his natural siblings, and the names and locations of any tribal or nontribal public or private agency which possess files or information concerning his placement. Such records shall not be open for inspection or copying pursuant to the Freedom of Information Act (80 Stat. 381), as amended, but information concerning a particular child placement shall be made available in *whole or in part, as necessary to an Indian child over the age of eighteen for the purpose of identifying the court which entered his final placement decree and furnishing such court with the information specified in section 104 or to the adoptive parent or foster parent of an Indian child or to an Indian tribe for the purpose of assisting in the enrollment of said Indian child in the tribe of which he is eligible for membership and for determining any rights or benefits associated with such membership. The records collected by the Secretary pursuant to this section shall be privileged and confidential and shall be used only for the specific purposes set forth in this Act.*

(b) A copy of any order of any nontribal public or private agency which effects the placement of an Indian child within the coverage of this Act shall be filed with the Secretary of the Interior by mailing a certified copy of said order within ten days from the date such order is issued. In addition, such public or private agency shall file with the Secretary of the Interior any further information which the Secretary may require by regulations in order to fulfill his recordkeeping functions under this Act.

Sec. 302. (a) The Secretary is authorized to perform any and all acts and to make rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act.

(b)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest agencies in the consideration and formation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectfully.

(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.

(c) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: Provided, That prior to any revision or amendment to such rules or regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Com-

mittee on Interior and Insular Affairs of the United States House of Representatives, respectively, and shall, to the extent practicable, consult with the tribes, organizations, and agencies specified in subsection (b)(1) of this section, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools contributes to the breakup of Indian families and denies Indian children the equal protection of the law.

(b) The Secretary is authorized and directed to prepare and to submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs and Committee on Education and Labor of the United States House of Representatives, respectively, within one year from the date of enactment of this Act, a plan, including a cost analysis statement, for the provision to Indian children of schools located near the students home. In developing this plan, the Secretary shall give priority to the need for educational facilities for children in the elementary grades.

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95TH CONGRESS
1ST SESSION

S. 1214

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 8, 1977

Referred to the Committee on Interior and Insular Affairs

AN ACT

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1977".

FINDINGS

SEC. 2. Recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people, the Congress finds that:

95TH CONGRESS
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AN ACT

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

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(a) An alarmingly high percentage of Indian children living within both urban communities and Indian reservations, are separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies and are placed in institutions (including boarding schools), or in foster or adoptive homes, usually with non-Indian families.

(b) The separation of Indian children from their families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand the nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the agency officials involved are unfamiliar with, and often disdainful of Indian culture and society; (4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and (5) responsible tribal authorities are not consulted about or even informed of the nontribal government actions.

(c) The separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For Indians generally, the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.

DECLARATION OF POLICY

SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.

DEFINITIONS

SEC. 4. For purposes of this Act:

(a) "Secretary", unless otherwise designated, means the Secretary of the Interior.

(b) "Indian" means any person who is a member of or who is eligible for membership in a federally recognized Indian tribe.

(c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided by the Bureau of Indian Affairs to Indians because of their status as Indians, including any Alaska Native villages, as listed in section II (b) (1) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697).

(d) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(e) "Tribal court" means any Court of Indian Offenses, any court established, operated, and maintained by an Indian tribe, and any other administrative tribunal of a tribe which exercise jurisdiction over child welfare matters in the name of a tribe.

(f) "Nontribal public or private agency" means any Federal, State, or local government department, bureau, agency, or other office, including any court other than a tribal court, and any private agency licensed by a State or local government, which has jurisdiction or which performs functions and exercises responsibilities in the fields of social services, welfare, and domestic relations, including child placement.

(g) "Reservation" means Indian country as defined in section 1151 of title 18, United States Code and as used in this Act, shall include lands within former reservations where the tribes still maintain a tribal government, and lands held by Alaska Native villages under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688). In a case where it has been judicially determined that a reservation has been diminished, the term "reservation" shall include lands within the last recognized boundaries of such diminished reservation prior to enactment of the allotment or pending statute which caused such diminishment.

(h) "Child placement" means any proceedings, judicial, quasi-judicial, or administrative, voluntary or involuntary, and public or private action (s) under which an Indian child is removed by a nontribal public or private agency from (1) the legal custody of his parent or parents, (2) the custody of any extended family member in whose care he has been left by his parent or parents, or (3) the custody of any extended family member who otherwise has custody in accordance with Indian law or custom, or (4) under which the parental or custodial rights of any of the above mentioned persons are impaired.

(i) "Parent" means the natural parent of an Indian child or any person who has adopted an Indian child in accordance with State, Federal, or tribal law or custom.

(j) "Extended family member" means any grandparent, aunt, or uncle (whether by blood or marriage), brother or sister, brother or sister-in-law, niece or nephew, first or second cousin, or stepparent whether by blood, or adoption, over the age of eighteen or otherwise emancipated, or as defined by tribal law or custom.

TITLE I—CHILD PLACEMENT JURISDICTION AND STANDARDS

SEC. 101. (a) No placement of an Indian child, except as provided in this Act shall be valid or given any legal force and effect, except temporary placement under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless (1) his parent or parents and the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody according to tribal law or custom, has been accorded not less than thirty days prior written notice of the placement proceeding, which shall include an explanation of the child placement proceedings, a statement of the facts upon which placement is sought, and a right: (A) to intervene in the proceedings as an interested party; (B) to submit evidence and present witnesses on his or her own behalf; and (C) to examine all reports or other documents and files upon which any decision with respect to child placement may be based; and (2) the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been made available and proved unsuccessful.

(b) Where the natural parent or parents of an Indian child who falls within the provisions of this Act, or the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, opposes the loss of custody, no child placement shall be valid or given any legal force and effect in the absence of a determination, supported by clear and convincing evidence, including testimony by qualified expert witnesses, that the continued custody of the child by his parent or parents, or the extended family member in whose care the child has been left, or otherwise has custody in accordance with tribal law or custom, will result in serious emotional or physical damage. In making such determination, poverty, crowded or inadequate housing, alcohol abuse or other nonconforming social behaviors on the part of either parent or extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, shall not be deemed prima facie evidence that serious physical or emotional damage to the child has occurred or will occur. The standards to be applied in any proceeding covered by this Act shall be the prevailing social and cultural standards of the Indian community in which the parent or parents or extended family member resides or with which the parent or parents or extended family member maintains social and cultural ties.

(c) In the event that the parent or parents of an Indian child consent to a child placement, whether temporary or permanent, such placement shall not be valid or given any legal force and effect, unless such consent is voluntary, in writing, executed before a judge of a court having jurisdiction over child placements, and accompanied by the witnessing judge's certificate that the consent was explained in detail, was translated into the parent's native language, and was fully understood by him or her. If the consent is to a nonadoptive child placement, the parent or parents may withdraw the consent at any time for any reason, and the consent shall be deemed for all purposes as having never been given. If the consent is to an adoptive child placement, the parent or parents may withdraw the consent for any reason at any time before the final decree of adoption: *Provided*, That no final decree of adoption may be entered within ninety days after the birth of such child or within ninety days after the parent or parents have given written consent to the adoption, whichever is later. Consent by the parent or parents of an Indian child given during pregnancy or within ten days after the birth of the child shall be conclusively presumed to be involuntary. A final decree of adoption may be set aside upon a showing that the child is again being placed for adoption, that the adoption did not comply with the requirements of this Act or was otherwise unlawful, or that the consent to the adoption was not voluntary. In the case of such a failed adoption, the parent or parents or the extended family member from whom custody was taken shall be afforded an opportunity to reopen the proceedings and petition for return of custody. Such prior parent or custodian shall be given thirty days notice of any proceedings to set aside or vacate a previous decree unless the prior parent or custodian waives in writing any right to such notice.

(d) No placement of an Indian child, except as otherwise provided by this Act, shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless his parent or parents, or the extended family member in whose care the child may have been left or who otherwise has custody in accordance with tribal law or custom, has been afforded the opportunity to be represented by counsel or lay advocate as required by the court having jurisdiction.

(c) Whenever an Indian child previously placed in foster care or temporary placement by any nontribal public or private agency is committed or placed, either voluntarily or involuntarily in any public or private institution, including but not limited to a correctional facility, institution for juvenile delinquents, mental hospital or halfway house, or is transferred from one foster home to another, notification shall forthwith be made to the tribe with which the child has significant contacts and his parent or parents or extended family member from whom the child was taken. Such notice shall include the exact location of the child's present placement and the reasons for changing his placement. Notice shall be made thirty days before the legal transfer of the child effected, if possible, and in any event within ten days thereafter.

SEC. 102. (a) In the case of any Indian child who resides within an Indian reservation which maintains a tribal court which exercises jurisdiction over child welfare matters, no child placement shall be valid or given any legal force and effect, unless made pursuant to an order of the tribal court. In the event that a duly constituted Federal or State agency or any representation thereof has good cause to believe that there exists an immediate threat to the emotional or physical well-being of an Indian child, such child may be temporarily removed from the circumstances giving rise to the danger provided that immediate notice shall be given to the tribal authorities, the parents, and the extended family member in whose care the child may have been left or who otherwise has custody according to tribal law or custom. Such notice shall include the child's exact whereabouts and the precise reasons for removal. Temporary removals beyond the boundaries of a reservation shall not affect the exclusive jurisdiction of the tribal court over the placement of an Indian child.

(b) In the case of an Indian child who resides within an Indian reservation which possesses but does not exercise jurisdiction over child welfare matters, no child placement, by any nontribal public or private agency shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless such jurisdiction is transferred to the State pursuant to a mutual agreement entered into between the State and the Indian tribe pursuant to subsection (j) of this section. In the event that no such agreement is in effect, the Federal agency or agencies servicing said reservation shall continue to exercise responsibility over the welfare of such child.

(c) In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a State, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless the Indian tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party in the child placement proceedings. In the event that the intervening tribe maintains a tribal court which has jurisdiction over child welfare matters, jurisdiction shall be transferred to such tribe upon its request unless good cause for refusal is affirmatively shown.

(d) In the event of a temporary placement or removal as provided in subsections (a), (b), and (c) above, immediate notice shall be given to the parent or parents, the custodian from whom the child was taken if other than the parent or parents, and the chief executive officer or such other person as such tribe or tribes may designate for receipt of notice. Such notice shall include the child's exact whereabouts, the precise reasons for his or her removal, the proposed placement plan, if any, and the time and place where hearings will be held if a temporary custody order is to be sought. In addition, where a tribally operated or licensed temporary child placement facility or program is available, such facilities shall be utilized. A temporary placement order must be sought at the next regular session of the court having jurisdiction and in no event shall any temporary or emergency placement exceed seventy-two hours without an order from the court of competent jurisdiction.

(e) For the purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents, or the extended family member in whose care he may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, is resident.

(f) For the purposes of this Act, whether or not a nonreservation resident Indian child has significant contacts with an Indian tribe shall be an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship. A finding that such Indian child does not have significant contacts with an Indian tribe sufficient to warrant a transfer of jurisdiction to a tribal court under subsection (c) of this section does not waive the preference standards for placement set forth in section 103 of this Act.

(g) It shall be the duty of the party seeking a change of the legal custody of an Indian child to notify the parent or parents, the extended family members from whom custody is to be taken, and the chief executive of any tribe or tribes with which such child has significant contacts by mailing prior written notice by registered mail to the parent or parents, or extended family member, and the chief executive officer of the tribe, or such other persons as such tribe or tribes may designate: *Provided*, That the judge or hearing officer at any child placement proceeding shall make a good faith determination of whether the child involved is Indian and, if so, whether the tribe or tribes with which the child has significant contacts were timely notified.

(h) Any program operated by a public or private agency which removes Indian children from a reservation area and places them in family homes as an incident to their attendance in schools located in communities in off-reservation areas and which are not educational exemptions as defined in the Interstate Compact on the Placement of Children shall not be deemed child placements for the purposes of this Act. Such programs shall provide the chief executive officer of said tribe with the same information now provided to sending and receiving States which are members of the Interstate

Compact on the Placement of Children. This notification shall be facilitated by mailing written notice by registered mail to the chief executive officer or other such person as the tribe may designate.

(i) Notwithstanding the Act of August 15, 1953 (67 Stat. 588), as amended, or any other Act under which a State has assumed jurisdiction over child welfare of any Indian tribe, upon sixty days written notice to the State in which it is located, any such Indian tribe may reassume the same jurisdiction over such child welfare matters as any other Indian tribe not affected by such Acts: *Provided*, That such Indian tribe shall first establish and provide mechanisms for implementation of such matters which shall be subject to the review and approval of the Secretary of the Interior. In the event the Secretary does not approve the mechanisms which the tribe proposes within sixty days, the Secretary shall provide such technical assistance and support as may be necessary to enable the tribe to correct any deficiencies which he has identified as a cause for disapproval. Following approval by the Secretary, such reassumption shall not take effect until sixty days after the Secretary provides notice to the State which is asserting such jurisdiction. Except as provided in section 102 (c), such reassumption shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such actions or proceeding shall abate by reason of such reassumption.

(j) States and tribes are specifically authorized to enter into mutual agreements or compacts with each other, respecting the care, custody, and jurisdictional authority of each party over any matter within the scope of this Act, including agreements which provide for transfer of jurisdiction on a case-by-case basis, and agreements which provide for concurrent jurisdiction between the States and the tribes. The provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 78) shall not limit the powers of States and tribes to enter into such agreements or compacts. Any such agreements shall be subject to revocation by either party upon sixty days written notice to the other. Except as provided in section 102 (c) such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such action or proceeding shall abate by reason of such revocation: *And provided further*, That such agreements shall not waive the rights of any tribe to notice and intervention as provided in this Act nor shall they alter the order of preference in child placement provided in this title. The Secretary of the Interior shall have sixty days after notification to review any such mutual agreements or compacts or any revocation thereof and in the absence of a disapproval for good cause shown, such agreement, compact, or revocation thereof shall become effective.

(k) Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act.

SEC. 103. (a) In offering for adoption an Indian child, in the absence of good cause shown to the contrary, a preference shall be given in the following order: (1) to the child's extended family; (2) to an Indian home on the reservation where the child resides or has significant contacts; (3) to an Indian home where the family head or heads are members of the tribe with which the child has significant contacts; and (4) to an Indian home approved by the tribe: *Provided, however,* That each Indian tribe may modify or amend the foregoing order of preference and may add or delete preference categories by resolution of its government.

(b) In any nonadoptive placement of an Indian child, every nontribal public or private agency, in the absence of good cause shown to the contrary, shall grant preferences in the following order: (1) to the child's extended family; (2) to a foster home, if any, licensed or otherwise designated by the Indian tribe occupying the reservation of which the child is a resident or with which the child has significant contacts; (3) to a foster home, if any, licensed by the Indian tribe of which the child is a member or is eligible for membership; (4) to any other foster home within an Indian reservation which is approved by the Indian tribe of which the child is a member or is eligible for membership in or with which the child has significant contacts; (5) to any foster home run by an Indian family; and (6) to a custodial institution for children operated by an Indian tribe, a tribal organization, or nonprofit Indian organization: *Provided, however,* That each Indian tribe may modify or amend the foregoing order of preferences, and may add or delete preference categories, by resolution of its government body.

(c) Every nontribal public or private agency shall maintain a record evidencing its efforts to comply with the order of preference provided under subsections (a) and (b), in each case of an Indian child placement. Such records shall be made available, at any time upon request of the appropriate tribal government authorities.

(d) Where an Indian child is placed in a foster or adoptive home, or in an institution, outside the reservation of which the child is a resident or with which he maintains significant contacts, pursuant to an order of a tribal court, the tribal court shall retain continuing jurisdiction over such child until the child attains the age of eighteen.

SEC. 104. In order to protect the unique rights associated with an individual's membership in an Indian tribe,

after an Indian child who has been previously placed attains the age of eighteen, upon his or her application to the court which entered the final placement decree, and in the absence of good cause shown to the contrary, the child shall have the right to learn the tribal affiliation of his parent or parents and such other information as may be necessary to protect the child's rights flowing from the tribal relationship.

SEC. 105. In any child placement proceeding within the scope of this Act, the United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the laws of any Indian tribe applicable to a proceeding under the Act and to any tribal court orders relating to the custody of a child who is the subject of such a proceeding.

TITLE II—INDIAN FAMILY DEVELOPMENT

SEC. 201. (a) The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to carry out or make grants to Indian tribes and Indian organizations for the purpose of assisting such tribes or organizations in the establishment and operation of Indian family development programs on or near reservations, as described in this section, and in the preparation and implementation of child welfare codes. The objective of every Indian family development program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or parents, or the custody of any extended family member in whose care he has been left his parent or parents, or one who otherwise has custody according to tribal law or custom, shall be effected only as a last resort. Such family development programs may include, but are not limited to, some or all of the following features:

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance of family development centers, as defined in subsection (b) hereof;

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment of Indian families and Indian children;

(5) home improvement programs;

(6) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(7) education and training of Indians, including tribal court judges and staff, in skills relating to child welfare and family assistance programs;

(8) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(9) guidance, legal representation, and advice to Indian families involved in tribal or nontribal child placement proceedings.

(b) Any Indian foster or adoptive home licensed or designated by a tribe (1) may accept Indian child placements by a nontribal public or private agency and State funds in support of Indian children; and (2) shall be granted preference in the placement of an Indian child in accordance with title I of this Act. For purposes of qualifying for assistance under any federally assisted program, licensing by a tribe shall be deemed equivalent to licensing by a State.

(c) Every Indian tribe is authorized to construct, operate, and maintain a family development center which may contain, but shall not be limited to—

(1) facilities for counseling Indian families which face disintegration and, where appropriate, for the treatment of individual family members;

(2) facilities for the temporary custody of Indian children whose natural parent or parents, or extended family member in whose care he has been left by his parent or parents or one who otherwise has custody

according to tribal law or custom, are temporarily unable or unwilling to care for them or who otherwise are left temporarily without adequate adult supervision by an extended family member.

SEC. 202. (a) The Secretary is also authorized under such rules and regulations as he may prescribe to carry out, or to make grants to Indian organizations to carry out, off-reservation Indian family development programs, as described in this section.

(b) Off-reservation Indian family development programs operated through grants with local Indian organizations, may include, but shall not be limited to, the following features:

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation, and maintenance of family development centers providing the facilities and services set forth in section 201 (d);

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment both of

Indian families which face disintegration and, where appropriate, of Indian foster and adoptive children; and

(5) guidance, representation, and advice to Indian families involved in child placement proceedings before nontribal public and private agencies.

SEC. 203. (a) In the establishment, operation, and funding of Indian family development programs, both on or off reservation, the Secretary may enter into agreements or other cooperative arrangements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare.

(b) There are authorized to be appropriated $26,000,000 during fiscal year 1979 and such sums thereafter as may be necessary during each subsequent fiscal year in order to carry out the purposes of this title.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) The Secretary of the Interior is authorized and directed under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which are effected after the date of this Act which records shall show as to each such placement the name and tribal affiliation of the child, the names and addresses of his natural parents and the extended family member, if any, in whose care he may have been left, the names and addresses of his adoptive parents, the names and addresses of his natural siblings, and the names and locations of any tribal or nontribal public or private agency which possess files or information concerning his placement. Such records shall not be open for inspection or copying pursuant to the Freedom of Information Act (80 Stat. 381), as amended, but information concerning a particular child placement shall be made available in whole or in part, as necessary to an Indian child over the age of eighteen for the purpose of identifying the court which entered his final placement decree and furnishing such court with the information specified in section 104 or to the adoptive parent or foster parent of an Indian child or to an Indian tribe for the purpose of assisting in the enrollment of said Indian child in the tribe of which he is eligible for membership and for determining any rights or benefits associated with such membership. The records collected by the Secretary pursuant to this section shall be privileged and confidential and shall be used only for the specific purposes set forth in this Act.

(b) A copy of any order of any nontribal public or private agency which effects the placement of an Indian child within the coverage of this Act shall be filed with the Secretary of the Interior by mailing a certified copy of said order within ten days from the date such order is issued. In addition, such public or private agency shall file with the Secretary of the Interior any further information which the Secretary may require by regulations in order to fulfill his recordkeeping functions under this Act.

SEC. 302. (a) The Secretary is authorized to perform any and all acts and to make rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act.

(b) (1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest agencies in the consideration and formation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively.

(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and

regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.

(c) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules or regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively, and shall, to the extent practicable, consult with the tribes, organizations, and agencies specified in subsection (b) (1) of this section, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools contributes to the breakup of Indian families and denies Indian children the equal protection of the law.

(b) The Secretary is authorized and directed to prepare and to submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs and Committee on Education and Labor of the United States House of Representatives, respectively, within one year from the date of enactment of this Act, a plan, including a cost analysis statement, for the provision to Indian children of schools located near the students home. In developing this plan, the Secretary shall give priority to the need for educational facilities for children in the elementary grades.

Passed the Senate November 4 (legislative day, November 1), 1977.

Attest: J. S. KIMMITT,

Secretary.

Appendix G

Proposed Rules

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[25 CFR Part 13]

Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

April 17, 1978.

AGENCY: Bureau of Indian Affiars, Department of the Interior.

ACTION: Proposed Rulemaking.

SUMMARY: The Bureau of Indian Affairs proposes to add a new part to its regulations to establish procedures by which an Indian tribe may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child welfare Act, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. s1918. It is intended that when published as final rulemaking these procedures will complement those related procedures to be published in 25 CFR Part 23, Indian Child Welfare Act, and also will complement recommended guidelines for State courts relative to Indian child custody proceedings to be published as a Federal Register Notice.

DATE: Comments must be received on or before May 23, 1979.

ADDRESS: Written comments should be addressed to David Etheridge, Officer of the Solicitor, Division of Indian Affairs, Department of the Interior, 18th and C Streets, NW., Washington, D.C. 20245.

FOR FURTHER INFORMATION CONTACT: David Etheridge, Office of the Solicitor, Division of Indian Affairs, Department of the Interior, telephone (202) 343–6967.

SUPPLEMENTARY INFORMATION: These proposed regulations incorporate viewpoints expressed during public hearings conducted during March, 1979. Additional and supplemental viewpoints are now solicited prior to publication of the regulations in final form.

The authority for issuing these regulations is contained in 5 U.S.C. 301 and sections 463 and 465 of the revised statutes (25 U.S.C. 2 and 9), and 209 DM 8.

The primary author of this document is David Etheridge, Office of the Solicitor, Division of Indian Affairs, Department of the Interior.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

It is proposed to add Part 13 to Subchapter B, Chapter I of Title 25 of the Code of Federal Regulations to read as follows:

PART 13—TRIBAL REASSUMPTION OF JURISDICTION OVER CHILD CUSTODY PROCEEDINGS

Subpart A—Purpose

Sec.
13.1 Purpose

Subpart B—Reassumption

13.11 Contents of reassumption petition.
13.12 Criteria for approval of reassumption petitions.
13.13 Technical assistance prior to petitioning.
13.14 Secretarial review procedure.
13.15 Finality of decision by the Secretary
13.16 Technical assistance after disapproval.

Authority: 5 U.S.C. 301, secs. 463, 465, of the revised statutes (25 U.S.C. 2 and 9) and 209 DM 8.

Subpart A—Purpose

§ 13.1 Purpose.

(a) The regulations of this part establish the procedures by which an Indian tribe that occupies territory that has become subject to concurrent or exclusive state jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), or pursuant to any other federal statute, may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, Pub. L. 95–608, 92 Stat 3069 25 U.S.C. 1918.

(b) On some reservations there are disputes concerning whether certain federal acts have subjected Indian child custody proceedings to state jurisdiction. Tribes located on those reservations may wish to exercise such jurisdiction without the necessity of engaging in protracted litigation. The procedures in this part also permit such tribes to secure unquestioned jurisdiction over Indian child custody matters without relinquishing their claim that no federal statute had ever deprived them of that jurisdiction.

Subpart B—Reassumption

§ 13.11 Contents of reassumption petition.

A petition to reassume jurisdiction over Indian child custody proceedings and the accompanying plan shall contain, where available, the following information in sufficient detail to permit the Secretary to determine whether reassumption is feasible:

(a) Full name, address and telephone number of the petitioning tribe or tribes.

(b) A resolution by the tribal governing body supporting the petition and plan. If the territory involved is occupied by more than one tribe, the governing body of each tribe involved must adopt such a resolution.

(c) The proposed date on which jurisdiction would be reassumed.

(d) Citation of the statute or statutes that has provided the basis for state assertion of jurisdiction over Indian child custody proceedings arising in the area covered by the petition.

(e) Legal description of the territory over which jurisdiction will be assumed together with a statement of the size of territory in square miles.

(f) If the statute or statutes resulting in state assertion of jurisdiction is a surplus land statute, a legal description of the reservation boundaries that will be reestablished for purposes of the Indian Child Welfare Act.

(g) Total number of Indian children residing in the affected territory.

(h) Total number of members in the petitioning tribe or tribes.

(i) Current criteria for membership in the tribe or tribes.

(j) Explanation of procedure by which a person with a legitimate interest in a child custody proceeding may determine whether a particular individual is a member of the tribe or tribes.

(k) Citation to provision in tribal constitution or similar governing document that authorizes the tribal governing body to exercise jurisdiction over Indian child custody matters.

(l) Description of judicial system that has been or will be established to adjudicate child custody disputes. The description shall include an organization chart and budget for the court. The source and amount of non-tribal funds that will be used to fund the court shall be identified.

(m) Copy of any tribal ordinances or court rules establishing procedures or rules for the adjudicating of Indian child custody matters.

(n) Description of support services (such as social service personnel and child care facilities) that will be available to the tribe or tribes when jurisdiction is reassumed.

(o) Estimate of the number of child custody cases expected during a year together with an explanation of how the number was estimated.

(p) Copy of any tribal agreements with states, other tribes or non-Indian local governments relating to child custody matters.

§ 13.12 Criteria for approval of reassumption petitions.

The Secretary shall approve a tribal petition to reassume jurisdiction over Indian child custody matters if:

(a) The territory affected by the petition was previously subject to tribal

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jurisdiction and is presently occupied by the tribe;

(b) The constitution or other governing document of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters;

(c) The information and documents required by § 13.11 of this part have been provided;

(d) A tribal judicial system has been established that is capable of adjudicating child custody matters in a manner that meets the requirements of the Indian Civil Rights Act, 25 U.S.C. *et seq.*;

(e) Child care services sufficient to meet the needs of any child the tribal judicial system finds must be removed from parental custody are available; and

(f) The tribe or tribes have established a procedure for clearly identifying who is a member of the tribe or is eligible for membership.

§ 13.13 Technical assistance prior to petitioning.

(a) Upon the request of a tribe desiring to reassume jurisdiction over Indian child custody matters, BIA agency and Area offices shall provide technical assistance to enable the tribe to meet the requirements for Secretarial approval of the petition.

(b) Upon the request of such a tribe, to the extent funds are available, the BIA may provide funding to assist the tribe in developing the judicial and child care services that will be needed when jurisdiction is reassumed.

§ 13.14 Secretarial review procedure.

(a) Upon receipt of the petition the Secretary shall cause to be published in the Federal Register a notice stating that the petition has been received and is under review and that it may be inspected and copied at the BIA agency office that serves the petitioning tribe.

(b) The Secretary shall publish a notice in the Federal Register stating whether the petition has been approved or disapproved at least 45 days after the petition was received. Notice that a petition has been disapproved shall be published no later than 75 days after receipt. Notice that a petition has been approved shall be published on a date requested by the petitioning tribe or within 75 days after receipt—whichever is later.

(c) Notice of approval shall include a legal description of the territory subject to the reassumption of jurisdiction and shall state the date on which the reassumption becomes effective. A copy of the notice shall immediately be sent to the petitioning tribe and to the attorney general of the affected state or states.

(d) Notice that a petition has been disapproved shall state the reasons for the disapproval and shall immediately be sent to the petitioning tribe.

§ 13.16 Finality of decision by the Secretary.

The decision of the Secretary to approve or disapprove a tribal petition is final for the Department.

§ 13.17 Technical assistance after disapproval.

If a petition is disapproved, the BIA shall immediately offer technical assistance to the tribal governing body for the purpose of overcoming the defect in the petition or plan that resulted in the disapproval.

Rick Lavis,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 79-12396 Filed 4-20-79; 8:45 am]

BILLING CODE 4310-02-M

[25 CFR Part 23]

Indian Child Welfare Act

April 17, 1979.

AGENCY: Bureau of Indian Affairs, Department of the Interior.

ACTION: Proposed rulemaking.

SUMMARY: The Bureau of Indian Affairs proposes to add a new part to its regulations to implement the provisions of the Indian Child Welfare Act of 1978 (Pub. L. 95–608). The Indian child Welfare Act seeks to protect the best interest of Indian children by promoting the stability and security of Indian families and tribes by preventing the unwarranted and arbitrary removal of Indian children from their Indian homes; establishing procedures for transferring Indian child custody proceedings from State courts to the appropriate Tribal courts; setting forth criteria for placement of children voluntarily or involuntarily removed from their parents, guardians, or custodians; providing a system of intervention in state court proceedings by the child's parents, relatives or the child's tribe in involuntary removal and adoption matters of Indian children, and providing grants to Indian tribes and organizations on or "near" reservations or off reservations to plan, establish, operate and manage child placement and family service programs to carry out the intent of the act. It is intended that when published as final rulemaking, these regulations will complement those related procedures to be published in 25 CFR Part 13, Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, and will also complement recommended guidelines for State courts relative to Indian child custody proceedings to be published as a Federal Register Notice.

DATE: Comments must be received on or before May 23, 1979.

ADDRESS: Written comments should be addresed to: Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, NW., Washington, D.C. 20245.

FOR FURTHER INFORMATION CONTACT: Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, telephone (703) 235–2756.

SUPPLEMENTARY INFORMATION: These proposed regulations incorporate viewpoints expressed during public hearings conducted during March, 1979. Additional and supplemental viewpoints are now solicited prior to publication of the regulations in final form. The authority for issuing these regulations is contained in 5 U.S.C. 301 and sections 463 and 465 of the revised statutes (25 U.S.C. 2 and 9), and 209 DM 8. The primary authors of this document are Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, and David Etheridge, Office of the Solicitor, Department of the Interior.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

It is proposed to add Part 23 to Subchapter D, Chapter I, of Tite 25 of the Code of Federal Regulations to read as follows:

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions and Policy

Sec.
23.1 Purpose.
23.2 Definitions.
23.3 Policy.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

23.11 Notice.
23.12 Designated agent for service of notice.
23.13 Payment for appointed counsel in State Indian child custody proceedings.

Subpart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

23.21 Eligibility requirements.
23.22 Purposes of grants.
23.23 Obtaining application instructions and materials.
23.24 Content of application.
23.25 Application selection criteria.

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23.26 Request from tribal governing body or Indian organization.
23.27 Grant approval limitation.
23.28 Submitting application.
23.29 Agency office review and recommendation.
23.30 Deadline for agency office action.
23.31 Area office review and action.
23.32 Deadline for Area office action.
23.33 Central office review and decision.
23.34 Deadline for Central office action.
23.35 Grant execution and administration.
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Authority: 5 U.S.C. 301; secs. 463 and 465 of the revised statutes (25 U.S.C. 2 and 9), and 209 DM 8.

Subpart A—Purpose, Definitions and Policy

§ 23.1 Purpose.

The purpose of the regulations in this Part is to govern the provision of administration and funding of the Indian Child Welfare Act of 1978 (Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901-1952.)

§ 23.2 Definitions.

(a) "Act" means the Indian Child Welfare Act, Pub. L. 95-608 (92 Stat. 3073), 25 U.S.C. 1901 *et seq.*

(b) "Child custody proceeding" shall mean and include—

(1) "Foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(2) "Termination of parental rights" which shall mean an action resulting in the termination of the parent-child relationship;

(3) "Preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(4) "Adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(5) Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(c) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(d) "Indian" means: (1) For purposes of matters related to child custody proceedings any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689); (2) For purposes of Indian child and family programs under sections 202 and 203 of the Indian Child Welfare Act (92 Stat. 3073) any person who, irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or is an Eskimo or Aleut or other Alaska Native, or is considered by the Secretary of the Interior to be an Indian for any purpose, or is determined to be an Indian under regulations promulgated by the Secretary.

(e) "Indian child" means any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. For services only under § 23.45(c) any person who is a member of an Indian tribe or any individual who (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band or other organized group terminated since 1940 or those recognized now or in the future by the State in which they reside, or who is the natural child or grandchild of any such member, or (2) is an Eskimo or Aleut or other Alaska Native, or (3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary.

(f) "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or eligible for membership or (2) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(g) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(h) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(i) "Indian tribe" means any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in Section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended.

(j) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

(k) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(l) For other applicable definitions refer to 25 CFR 20.1 and 271.2.

§ 23.3 Policy.

The policy of the Act and of these regulations is to protect Indian children

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from arbitrary removal from their families and tribal affiliations by establishing procedures to insure that preventative measures are followed in child custody proceedings. This will insure protection of the best interests of Indian children and Indian families by providing assistance and funding to Indian tribes and Indian organizations in the operation of child and family service programs, reflecting the unique values of Indian culture and promoting the stability and security of Indian families. In administering the grant authority for Indian Child and Family Programs it shall be Bureau policy to emphasize the design and funding of programs to promote the stability of Indian families.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

§ 23.11 Notice.

If the identity or location of the parent or Indian custodian and tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be given to the Secretary of the Interior by registered mail with return receipt requested. The proper address for transmittal of such information to the Secretary shall be published in the Federal Register and shall be sent to the Chief Justice of the highest court of appeal and the Attorney General of each state. The Secretary shall have 15 days, after receipt, to notify the parent(s), Indian custodian, and the Indian child's tribe, with a copy to the State court. If within the 15 day time period the Secretary is unable to make identification that the child is in fact an Indian, has an Indian parent(s) or Indian custodian, or has a relationship with an Indian tribe, the Secretary shall so notify the State court.

§ 23.12 Designated agent for service of notice.

Any Indian tribe entitled to notice may designate by resolution an agent for service of such notice other than the tribal chairman. The tribe shall send a copy of the resolution to the Secretary. The Secretary shall publish the name and address of the designated agent for service of notice in the Federal Register. The Secretary shall send the name and address of the tribe's designated agent to the Chief Justice of the highest court of appeal and the Attorney General of each state.

§ 23.13 Payment for appointed counsel in state Indian child custody proceedings.

(a) When a state court appoints counsel for an indigent party in an Indian child custody proceeding, for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the Director of the Bureau of Indian Affairs Area Office that serves the tribe of the child whose custody is at issue. The notice shall include the following:

(1) Name, address and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of the client to the child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Copy of affidavit of indigency or other document stating the facts on which the court based its determination that the client is indigent.

(7) Certification by the court that State law makes no provision for appointment of counsel in such proceedings.

(8) Certification by the court that the client is indigent under the State standards that apply in a juvenile delinquency proceeding.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the Bureau of Indian Affairs unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903(1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), or the child's Indian custodian as defined in 25 U.S.C. 1903(6);

(4) The court has abused the discretion accorded it under State law to determine that the client is indigent;

(5) State law provides for appointment of counsel in such proceedings;

(6) The notice to the Area Director of appointment of counsel is incomplete, or

(7) No funds are available for such payments.

(c) No later than 15 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client and the attorney in writing whether the client has been certified as eligibile to have his or her attorney fees and expenses paid by the Bureau of Indian Affairs. In the event that certification is denied, the notice shall include written reasons for that decision together with a statement that the Area Director's decision may be appealed to the Commissioner of Indian Affairs under the provisions of 25 CFR Part 2.

(d) When determining attorney fees and expenses:

(1) The court shall determine the amount of payments due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in juvenile delinquency proceedings.

(2) The court shall submit approved vouchers to the Area Director who certified eligibility for BIA payment together with the court's certification that the amount requested is reasonable under the State standards and considering the work actually performed in light of the criteria that apply in determining fees and expenses for appointed counsel in juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher required unless:

(1) The court has abused its discretion under State law in determining the amount of the fees and expenses; or

(2) The client has not previously been certified as eligibile under paragraph (c) of this section.

(f) No later than 15 days after receipt of a payment voucher the Area Director shall send written notice to the court, the client and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied or the amount authorized is less than the amount requested in the voucher, the notice shall include a written statement of the reasons for the decision together with a statement that the decision of the Area Director may be appealed to the Commissioner under the procedures of 25 CFR Part 2.

Subpart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

§ 23.21 Eligibility requirements.

The governing body of any tribe or tribes, or any nonprofit Indian organization, including multi-service Indian centers, may apply for a grant under this part.

§ 23.22 Purpose of grants.

(a) Grants are for the purpose of the establishment and operation of Indian child and family service programs. Examples in this specific regard are as follows:

(1) Operation and maintenance of facilities for the counseling and

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treatment of Indian families and for the temporary custody of Indian children.

(2) Family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities and respite care.

(3) Employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters.

(4) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs.

(5) Subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligibile as foster children, taking into account the appropriate State standards of support for maintenance and medical needs.

(6) Guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(7) Home improvements programs.

(8) Other activities which have a direct and demonstrable relationship to the provision of child and family service programs.

(b) Preparation and implentation of child welfare codes. An example in this regard is establishment of a system for licensing or otherwise regulating Indian foster and adoptive homes.

(c) Funds made available for grants for the purposes described above may be applied as matching shares for other Federal or non-Federal grant programs as prescribed in § 23.43.

§ 23.23 Obtaining application instructions and materials.

Application instructions and related application materials may be obtained from Superintendents, Area Directors and the Commissioner.

§ 23.24 Content of application.

Application for a grant under this part shall include:

(a) Name and address of Indian tribal governing body(s) or Indian organization applying for a grant.

(b) Descriptive name of project.

(c) Federal funding needed.

(d) Population directly benefiting from the project.

(e) Length of project.

(f) Beginning date.

(g) Project budget categories or items.

(h) Program narrative statement.

(i) Certification or evidence of request by Indian tribe or board of Indian organization.

(j) Name and address of Bureau office to which application is submitted.

(k) Date application is submitted to Bureau.

(l) Additional information pertaining to grant applications for funds to be used as matching shares will be requested as prescribed in § 23.42.

§ 23.25 Application selection criteria.

(a) The Commissioner or designated representative, shall select Indian tribes and Indian organizations for grants under this part whose proposals will in his judgment best promote the purposes of Title II of the Act taking into consideration the following factors:

(1) The number of actual Indian child placements outside the home, the number of Indian family breakups, and the need for directly related preventive programs, all as determined by analysis of relevant statistical and other data available from tribal and public court records and from the records of tribal, Bureau, and private social services agencies serving Indian children and their families.

(2) The relative accessibility which the Indian population to be served under specific proposal already has to existing child and family service programs emphasizing prevention of Indian family breakup. Factors to be considered in determining relative accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Lack of program which provide free service to indigent families;

(v) Technical barriers created by existing public or private programs;

(vi) Availability of transportation to existing programs;

(vii) Distance between the Indian community to be served under the proposal and the nearest existing program.

(3) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup.

(b) Selection for grants under this part for on or near reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract subject to the provisions of § 23.36.

(c) Selection for grants under this part for off reservation programs shall be limited to those Indian organizations which can demonstrate local majority support from the Indian community or communities to be served by the grant. However, the Indian organization may make a subgrant or subcontract subject to the provisions of § 23.36. Factors to be considered in determining local majority support include:

(1) Letters of support from individuals and families to be served;

(2) Local Indian community representation in and control over the Indian entity requesting the grant.

(3) Other verifiable evidence of local majority support which may be accepted in lieu of paragraph (c) (1) and (2) of this section when the applicant is an established multi-service urban Indian center. Such evidence may include but not be limited to the organization's charter or its record of administration of grants or contracts obtained from private, state or other Federal governmental entities.

§ 23.46 Request from tribal governing body or Indian organization.

(a) The Bureau shall only make a grant under this part for an on or near reservation program when officially requested to do so by a tribal governing body. This request may be in the form of a tribal resolution, an endorsement included in the grant application or such other forms as the tribal constitution or current practice requires.

(b) The Bureau shall only make a grant under this part for an off reservation program when officially requested to do so by the governing body of an Indian organization. This request may be in one of the forms prescribed in paragraph (a) of this section and shall be further subject to the provisions of § 23.45(c) (1), (2), (3) above.

§ 23.27 Grant approval limitations.

(a) Area Office approval. Authority for approval of a grant application under this part shall be with the Area Director when the intent, purpose and scope of the grant proposal pertains soley to an Indian tribe or tribes, or to an Indian organization representing an off reservation community, located within that Area Director's administrative jurisdiction.

(b) Central Office approval. Authority for approval of a grant application under this part shall be with the Commissioner when the intent, purpose and scope of the grant proposal pertains to Indian tribes, off reservation communities or Indian organizations representing different Area office administrative jurisdictions but located within the Commissioner's overall jurisdiction.

(c) Grant approvals under this section shall be subject to availability of funds. These funds will include those which are:

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(1) Directly appropriated for implementation of this Act. Distribution to approved applicants of these appropriated and available funds will be based upon the ratio of the number of Indian children under age 18 to be served under a specific proposal to the number of all Indian children under age 18 nationally. This is to insure insofar as possible that all approved applicants receive a proportionally equitable share sufficient to fund an effective program. This formula will be published as a Federal Register notice.

(2) Appropriated under other Acts for Bureau programs which are related to the puposes prescribed in § 23.22.

§ 23.28 Submitting application.

(a) *Agency Office.* An application for a grant under this part for an on or near reservation program shall be initially submitted to the appropriate Superintendent for review and recommendation as prescribed in § 23.29.

(b) *Area Office.* An application for a grant under this part for an off reservation program shall be initially submitted to the appropriate Area Director for review and action as prescribed in § 23.31.

§ 23.29 Agency office review and recommendation.

(a) Recommendation for appoval or disapproval of a grant under this part shall be made by the Superintendent when the intent, purpose and scope of the grant proposal pertains to or involves an Indian tribe or tribes located within that Superintendent's administrative jurisdiction.

(d) Upon receipt of an application for a grant under this part, the Superintendent shall:

(1) Acknowledge in writing receipt of the application within 10 days of its arrival at the Agency Office.

(2) Review the application for completeness of information and promptly request any additional information which may be required to make a recommendation.

(3) Assess the completed application for appropriateness of purpose as prescribed in § 23.22, and for overall feasibility.

(4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediements which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.

(5) Recommend approval or disapproval following full assessment of the completed application and foward the application and recommendation to the Area Director for further action.

(6) Promptly notify the applicant in writing as to the final recommendation. If the final recommendation is for disapproval, the Superintendent will include in the written notice to the applicant the specific reasons therefor.

(7) In instances where a joint application is made by tribes representing more than one Agency Office administrative jurisdiction, copies of the application shall be provided by the applicants to each involved Superintendent for review and recommendation as precribed in this section.

§ 23.30 Deadline for agency office action.

Within 30 days of receipt of an application for a grant under this part, the Superintendent shall take action as prescribed in § 23.29. Extension of this deadline will required consultation with and written consent of the applicant.

§ 23.31 Area office review and action.

(a) Upon receipt of an application for a grant requiring Area Office approval, the Area Director shall:

(1) Review the application following applicable review procedure prescribed in § 23.29.

(2) Review the Superintendent's recommendation as pertains to the application.

(3) Approve or disapprove the application.

(b) In instances where a joint application is made by tribes representing more than one Area Office administrative jurisdiction, the Area Director shall add his recommendation for approval or disapproval to that of the Superintendent and shall forward the application and recommendations to the Commissioner for futher action.

(c) Upon taking action as prescribed in paragraph (a) or (b) of this section, the Area Director shall promptly notify the applicant in writing as to the action taken. If the action taken is disapproval or recommendation for disapproval of the application, the Area Director will include in the written notice the specific reasons therefor.

§ 23.32 Deadline for Area office action.

Within 30 days of receipt of an application for a grant under this part, the Area Director shall take action as prescribed in § 23.31. Extension of this deadline will required consultation with and written consent of the applicant.

§ 23.33 Central office review and decision.

Upon receipt of an application for a grant requiring Central office approval, the Commissioner shall:

(a) Review the application following the applicable review procedures prescribed in § 23.29.

(b) Review Agency and Area office recommendations as pertain to the application.

(c) Approve or disapprove the application.

(d) Promptly notify the applicant in writing as to the approval or disapproval of the application. If the application is disapprove, the Commissioner will include in the written notice the specific reasons therefor.

§ 23.34 Deadline for central office action.

Within 30 days of receipt of an application for a grant under this part the Commissioner shall take action as prescribed in § 23.33. Extension of this deadline will require consultation with and written consent of the applicant.

§ 23.35 Grant execution and administration.

(a) Grants approved pursuant to § 23.27(b) shall be executed and administered at the Central Office level: *Provided,* That the Commissioner may designate an Area office to execute or administer such a grant.

§ 23.36 Subgrants and subcontracts.

The grantee may make subgrants or subcontracts under this part: *Provided,* That such subgrants or subcontracts are for the purpose for which the grant was made and that the grantees retains administrative and financial responsibility over the activity and the funds.

Subpart D—General Grant Requirements

§ 23.41 Applicability.

The general requirements for grant administration in this part are applicable to all Bureau grants provided to tribal governing bodies and to Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute or regulation.

§ 23.42 Reports and availability of information to Indians.

Any tribal governing body or Indian organization receiving a grant under this part shall make information and reports concerning that grant available to the Indian people which it serves or represents. Access to these data shall be requested in writing and shall be made available within 10 days of receipt of that request, subject to any exceptions

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provided for in the Freedom of Information Act (5 U.S.C. 552), as amended by the Act of November 21, 1974 (Pub. L. 93-502; 88 Stat. 1561).

§ 23.43 Matching share.

(a) Specific Federal laws notwithstanding, grant funds provided under this part may be used as matching share for any other Federal or non-Federal programs which contribute to the purposes specified in § 23.22.

(b) Superintendents, Area Directors, and their designated representatives will, upon tribal or Indian organization request, assist in obtaining information concerning other Federal agencies with matching fund programs and will, upon request, provide technical assistance in developing applications for submission to those Federal agencies.

§ 23.44 Performing personal services.

Any grant provided under this part may include provisions for the performance of personal services which would otherwise be performed by Federal employees.

§ 23.45 Penalties.

If any officer, director, agent, or employee of, or connected with, any recipient of a grant, subgrant, contract or subcontract under this part, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, he or she may be subject to penalties as provided in 18 U.S.C. 1001.

§ 23.46 Fair and uniform services.

Any grant provided under this part shall include provisions to assure the fair and uniform provision by the grantee of services and assistance to all Indians included within or affected by the intent, purpose and scope of that grant.

Subpart E—Grant Revision, Cancellation or Assumption

§ 23.51 Revisions or amendments of grants.

(a) Request for budget revisions or amendments to grants awarded under this part shall be made as provided in § 276.14 of this chapter.

(b) Requests for revisions or amendments to grants provided under this part, other than budget revisions referred to in paragraph (a) of this section, shall be made to the Bureau officer responsible for approving the grant in its original form. Upon receipt of a request for revisions or amendments to grants, the responsible Bureau officer shall follow precisely the same review procedures and time specified in § 23.29.

§ 23.52 Assumption.

(a) When the Bureau cancels a grant for cause as specified in § 276.15 of this chapter, the Bureau may assume control or operation of the grant program, activity or service. However, the Bureau shall not assume a grant program, activity or service that it did not administer before tribal grantee control unless the tribal grantee and the Bureau agree to the assumption.

(b) When the Bureau assumes control or operation of a grant program cancelled for cause, the Bureau may decline to enter into a new grant agreement until satisfied that the cause for cancellation has been corrected.

Subpart F—Hearings and Appeals

§ 23.61 Hearings.

Hearings referred to in § 276.15 of this chapter shall be conducted as follows:

(a) The grantee and the Indian tribe(s) affected shall be notified in writing, at least 10 days before the hearing. The notice should give the date, time, places, and purpose of the hearing.

(b) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within 5 days following the hearing.

(c) The hearing will be conducted on as informal a basis as possible.

§ 23.62 Appeals from decision or action by Superintendent.

(a) A grantee may appeal any decision made or action taken by a Superintendent under this part. Such appeal shall be made to the Area Director as provided in Part 2 of this chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.63 Appeals from decisions or action by Area Director.

(a) A grantee may appeal any decision made or action taken by an Area Director under this part. Such appeal shall be made to the Commissioner as provided in Part 2 of this chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.64 Appeals from decision or action by Commissioner.

(a) A grantee may appeal any decision made or action taken by the Commissioner under this part only as provided in Part 2 of this chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.65 Failure of agency or area office to act.

Whenever a Superintendent or Area Director fails to take action on a grant application within the time limits established in this part, the applicant may at its option, request action by the next higher Bureau official who has approval authority as precribed in this part. In such instances, the Superintendent or Area Director who failed to act shall immediately forward the application and all related materials to that next higher Bureau official.

Subpart G—Administrative Requirements

§ 23.71 Uniform administrative requirements for grants.

Administrative requirements for all grants provided under this part shall be those prescribed in Part 276 of this chapter.

Subpart H—Administrative Provisions

§ 23.81 Recordkeeping and information availability.

(a) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary of the Interior within 30 days a copy of said decree or order, together with any information necessary to show:

(1) Name of the child and the tribal affiliation of the child;

(2) Names and addresses of the biological parents and the adoptive parents;

(3) Identity of any agency having relevant information relating to said adoptive placement.

To assure and maintain confidentiality where the biological parent(s) have by affidavit requested their identity remain confidential, a copy of such affidavit shall be provided the Secretary. Such information, pursuant to Sec. 301(a) of the Act, shall not be subject to the Freedom of Information Act (5 U.S.C. 552) as amended. The Secretary shall insure the confidentiality of such information is maintained. The proper address for transmittal of information required by Sec. 301(a) of the Act to the Secretary shall be published in the Federal Register and shall be sent to the Chief Justice of the highest court of Appeal and the Attorney General of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, there is no objection to that

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agency assuming reporting responsibilities for the purpose of this Act.

(b) The Division of Social Services, Bureau of Indian Affairs is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of the adopted Indian individual over the age of eighteen, the adoptive foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for enrollment or determining any rights or benefits associated with membership. The Chief Tribal Enrollment Officer of the Bureau of Indian Affairs is authorized to disclose enrollment information relating to an adopted Indian child, where the biological parents have by affidavit requested anonymity. In such cases, the Chief Tribal Enrollment Officer shall certify to the child's tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by said tribe.

Rick Lavis,
Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 79-12397 Filed 4-20-79; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Recommended Guidelines for State Courts—Indian Child Custody Proceedings

April 17, 1979.

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary, Indian Affairs by 209 DM 8.

In order to facilitate the fullest possible measure of implementation of the Indian Child Welfare Act of 1978, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C., the following guidelines are provided and recommended for use by State courts in Indian child custody proceedings. The Act does not delegate to the Interior Department the authority to *mandate* procedures for state or tribal courts. Many judges, however, have indicated an interest in learning the views of this Department on how they might best implement the Act. These guidelines have been prepared to respond to those requests for our views.

It is intended that these guidelines will complement those related procedures to be published in 25 CFR Part 13, Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, and also will complement those related procedures to be published in 25 CFR Part 23, Indian Child Welfare Act. Recommended guidelines for use by State courts involved in Indian child custody proceedings are:

(a) Definitions.

(1) "Tribal law or custom" means unwritten or written law or custom of the Indian child's tribe.

(2) "Qualified expert witness" shall be determined by the court. The court should take into consideration (i) a professional person having a substantial education and experience in the area of his or her specialty; (ii) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian community relevant to the Indian child who is the subject of the child custody proceeding; (iii) a member of the child's Indian community who is recognized within the community as an expert in tribal customs as they pertain to family organization and childrearing practices.

(3) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(b) Policy.

Proceedings in state courts involving custody of Indian children should follow strict procedures and meet stringent requirements to justify placing Indian children outside of their families or tribal communities.

(c) Determination of child as Indian child.

When the state court determines whether an Indian child is involved in an involuntary child custody proceeding, report on such inquiry should be made a part of the record and should detail the steps taken by the court to discover whether the child is an Indian child. A court should consider as actual or constructive knowledge that the child is an Indian child if:

(1) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(2) Any public or state license agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(3) Any child who is involved in an involuntary proceeding gives the court reason to believe that he or she is an Indian child.

(4) The residence or domicile of the child, his natural parents, or Indian custodian is known by the court to be a predominantly Indian community.

(5) An officer of the court, involved in the proceeding, has knowledge that the child may be an Indian child.

If the court has such actual or constructive knowledge, it should seek independent verification of the information prior to a final determination that the child is an Indian child.

(d) Determination of Indian child's tribe.

(1) Where an Indian child is not enrolled in any tribe and is eligible for membership in more than one tribe, the court is called upon to determine with which tribe the child has more significant contacts. In arriving at such determination, the court should consider, among other things, the following factors:

(i) Length of residence or frequency of other contacts with a particular reservation;

(ii) Child's participation in tribal activities;

(iii) Child's fluency in language of a tribe;

(iv) Previous adjudication with respect to the child by a tribal court;

(v) residence on a reservation by the child's relatives;

(vi) Tribal membership of custodial parent or other Indian custodian; and

(vii) Interest asserted by a tribe in response to the notice given under (e)(2).

(2) The court's determination, together with the basis therefore shall be made part of the record, and notice of it shall be given to all parties as well as to all tribes which received notice under (e)(2).

(3) The tribe with which the child ultimately becomes a member should thereafter be considered the Indian child's tribe for all purposes under the Act and these guidelines.

(e) Notice.

(1) In any involuntary child custody proceeding, the state court should make inquiries to determine if the child involved is a member of an Indian tribe or is eligible for membership in an Indian tribe.

(2) In any involuntary Indian child custody proceeding, notice of the proceeding should be sent to the parent(s) or Indian custodian and the Indian child's tribe by registered mail with return receipt requested. The notice should be written in clear and understandable language and shall include information on:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of petitioner's attorney.

(v) A statement of the right of the natural parent or Indian custodian and the Indian tribe to intervene in the proceeding.

(vi) A statement that if the parent or Indian custodian is unable to afford counsel, counsel will be appointed to represent him or her.

(vii) A statement of the right of the natural parent or Indian custodian or Indian child's tribe to have, on request, up to twenty additional days to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of a parent or Indian custodian or the child's tribe to petition the court for transfer of the proceeding to the child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the natural parent or Indian custodian.

(f) Extension of time.

A tribe, parent or Indian custodian which received notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted up to twenty days from the date upon which the notice was received to prepare for participation in the proceeding.

(g) Request for transfer of proceeding.

A parent or Indian custodian of the Indian child, or the child's tribe, may orally or in writing request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. Where no timely request for transfer is made, the state court should hear the proceeding.

(h) Determination on transfer request.

Upon receipt of a request to transfer by a parent or Indian custodian or the tribe, the court must transfer the case unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for declining the transfer.

(i) Good cause determination.

Good cause to the contrary should be determined by considering the following circumstances. These guidelines are neither inclusive or exclusive:

(1) The child's biological parents are deceased or unavailable.

(2) An Indian custodian or guardian has not been appointed.

(3) The child has had little or no contact with his Indian tribe, or members of his tribe, for a significant period of time.

(4) The child has not resided on his reservation for a significant period of time.

(5) A child, over twelve years of age, has indicated opposition to the transfer.

Socio-economic conditions and the perceived adequacy of tribal or Bureau social services or judicial systems shall not be considered in a determination that good cause exists.

(j) Tribal court acceptance or declination of transfer.

Any tribal court to which transfer is requested can without reason, decline to accept such transfer.

The tribal court should have 10 days from the receipt of notice of a proposed transfer within which time to accept that transfer. If no acceptance is received by the state court within that time, either orally or in writing, then it should be presumed that the tribal court has rejected the proposed transfer and the state court should proceed to adjudicate the petition.

If the tribal court accepts transfer, the state court should provide the tribal court with all available information on the status of the case.

(k) Access to reports.

Parents or Indian custodians or tribes who are party to a child custody proceeding under state law have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(l) Child and family services requires prior to commencement of the proceedings.

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding, active efforts have been made to prevent breakup of the Indian family. These efforts should take into account the prevailing social and cultural conditions and way of life in the Indian community.

(m) Standards of evidence in cases involving removal and placement of Indian children in involuntary proceedings.

The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented including testimony of qualified expert witnesses which clearly reflects that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

The court may not order a termination of parent rights unless that determination is supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(n) Execution of voluntary consent to foster care placement or to termination of parental rights.

A valid consent must be executed in writing and recorded before a judge of a court of competent jurisdiction. A certification of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian.

(o) Content of consent.

(1) Any such consent should contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(2) A consent to foster care placement should contain, in addition to the information specified in (1), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(3) A consent to termination of parental rights or adoption should contain, in addition to the information specified in (1), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

(p) Withdrawal of consent to foster care placement.

Where a parent or Indian custodian has consented to a foster care placement under State law, such consent may be withdrawn at any time by filing, in the court where the consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child should as soon as is practicable, be returned to that parent or Indian custodian.

(q) Withdrawal of consent to adoption.

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, by filing in the court where the consent was filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed should promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing, and that party should insure the return of the child to the parent, as soon as is practicable.

(r) Petition to vacate adoption decree.

(1) Within two years after a final decree of adoption of an Indian child by a state court, or within any longer period permitted by the law of the state, a parent who executed a consent to termination of parental rights or adoption of that child, may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(2) Upon the filing of such petition, the court should give notice thereof to all parties to the adoption proceeding, and should proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked, and order the child returned to the parent.

(s) Adoptive placement.

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(1) In any adoptive placement of an Indian child under state law, a preference must be given, absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents; in that order.

(2) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed as long as the placement is the least restrictive and most appropriate to meet the needs of the child.

(t) Foster care or preadoptive placement.

In any foster care or preadoptive placement of an Indian child:

(1) The child must be placed in the least restrictive setting which

(i) Most approximates a family

(ii) In which his special needs may be met; and

(iii) Which is in reasonable proximity to his or her home

(2) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs;

(3) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference should be followed as long as the criteria enumerated in (1) are met.

(u) Good cause determination.

For purposes of any such foster care, preadoptive, or adoptive placement, a determination of good cause to the contrary for such placement in accord with the preferences set out above should consider:

(1) the requests of the biological parents, or the child when the child is of sufficient age.

(2) the special needs of the child—including educational, emotional, cultural, physical, and medical needs.

(3) the availability of suitable families for placement after a diligent search has been completed.

(v) Maintenance of records.

The state should maintain records, in a single location, of every foster care, preadoptive and adoptive placement of Indian children by courts of that state. The records of any such placement must be made available at any time upon request, to the child's tribe or to the Secretary. The records should contain, at a minimum, the petition of complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

(w) Notice of change in child's status.

Whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parent has voluntarily consented to the termination of his parental rights to the child, notice by the court or an agency authorized by the court should be given to the child's biological parent or prior Indian custodian. They should be informed of their right to petition for return of custody of the child.

(x) Adult adoptee rights.

Upon application by an Indian individual who has reached age 18 and who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(y) Emergency removal of child.

(1) Whenever an Indian child is removed from the physical custody of its parent or Indian custodian pursuant to the emergency removal or custody provisions of state law, the state authority, agency or official or the state court should immediately cause an inquiry to be made as to the residence or domicile of such Indian child.

(2) No later than the time within which, under state law, the state authority, agency or official must obtain a court order authorizing continued emergency physical custody, the state authority, agency of official should file an affidavit, as part of such emergency removal proceeding or otherwise, containing the following information:

(i) The name, age and last known address of the Indian child;

(ii) The name and address of the child's parent and Indian custodian if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate the child's parent and Indian custodian, if any, should be provided;

(iii) Whether the residence of the parents, Indian custodian or child is within a reservation and which reservation;

(iv) The tribal affiliation of the child and the parent or Indian custodian;

(v) A specific and detailed account of the circumstances which led the state authority, agency or official to conclude that the child would suffer imminent physical damage or harm.

(vi) The specific actions that the state authority, agency or official is taking or has taken to secure the restoration of the child to his parent or Indian custodian, including the services provided, or to transfer the child to the jurisdiction of the appropriate Indian tribe.

(3) If the Indian child is not restored to its parent or Indian custodian, or if jurisdiction is not transferred to the appropriate Indian tribe, the state authority, agency or official must commence a state court proceeding for foster care placement as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists.

(z) State-tribal agreements.

States and Indian tribes may enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings.

These agreements may include informal transfer procedures on a case-by-case basis between state and tribal courts in those cases where all parties involved in the court proceeding, including parents, Indian custodian and Indian child if he or she is of sufficient age, express a preference in the adjudication process to transfer the proceedings to conclude that the tribal court can best serve the needs of the Indian child. The geographical proximity of the Indian child and family residence to the Indian child's reservation should be considered in making the transfer agreement for the provision of services.

Rick Lavis,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 79-12308 Filed 4-20-79; 8:45 am]

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Appendix H

Draft, Proposed Rules

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Title 25--Indians

CHAPTER 1 - BUREAU OF INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR

SUBCHAPTER D - SOCIAL WELFARE
PART 23 - INDIAN CHILD WELFARE ACT

PREAMBLE

The proposed regulations in this Part establish implementation procedures for those provisions of the Indian Child Welfare Act of November 8, 1978, P.L. 95-608, Stat. 3069, 25 U.S.C. 1901-1952 which are identified by the Act as basic responsibilities of the Secretary of the Interior. The draft regulations are not all-inclusive of the Act. The public is invited to offer comments and suggestions on these draft regulations, as well as all other sections of the Act.

The draft regulations relating to Title II of the Act, Indian Child and Family Programs, are largely procedural rather than substantive, because at this time there are no appropriated funds to implement the Act. Substantive regulations will depend upon the authorized programs for which funds are ultimately appropriated. The procedural regulations closely parallel existing regulations in 25 C.F.R. 272, Grants Under Indian Self-Determination Act as authorized under P.L. 93-638, in order that all grant regulations of this Bureau be as consistent as possible for all programs.

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PART 23-INDIAN CHILD WELFARE ACT

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Subpart A-Purpose, Definitions and Policy

s23.1 Purpose.

The purpose of the regulations in this Subpart is to govern the provision of administration and funding of the Indian Child Welfare Act of 1978, P.L. 95-608, Stat. 3069, 25 U.S.C. 1901-1952.

s23.2 Definitions.

(a) "Child custody proceeding" means any voluntary or involuntary Administrative and/or Judicial action removing an Indian child from its parent(s) or Indian custodian, wherein the parent or Indian custodian cannot immediately have the child returned upon demand.

(b) "Indian" or "Indians" means, for services under S23.25(c) any person who is a member of an Indian tribe or any individual who (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band or other organized group terminated since 1940 or those recognized now or in the future by the State in which they reside, or who is the natural child or grandchild of any such member, or (2) is an Eskimo or Aleut or other Alaska Native, or (3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary.

(c) "Indian organization" means for grants under s23.25(c) a nonprofit corporate entity composed of Indians which

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provides for the maximum participation of all interested Indian groups and individuals and which has the provision of child and family services as its principal functions.

(d) For other applicable definitions refer to 25 C.F.R. 20.1 and 272.2.

s23.3 Policy.

To protect the best interests of Indian children and Indian families by providing assistance and funding to Indian tribes and Indian organizations in the operation of child and family service programs, which reflect the unique values of Indian culture and promote the stability and the security of Indian families. In administering the grant authority for Indian Child and Family Programs it shall be Bureau policy to emphasize the design and funding of programs to promote the stability of Indian families.

Subpart B-Child Custody Proceedings and Payment for Appointed Counsel

s23.11 Child custody proceedings.

In any involuntary child custody proceeding in a State court involving an Indian child, the court with due diligence shall notify the parent(s), the Indian custodian, if any, and the Indian child's tribe by registered mail, with return receipt requested, of the pending proceeding and of their right of intervention. Where the identity or whereabouts of the parent(s), Indian custodian, or tribe cannot be determined, notification, accompanied by all identifying available information shall be sent to the Secretary in like manner. The ThSecretary shall have 15 days, after receipt to notify the parent(s), Indian custodian, and the Indian child's tribe, with a copy to the State court. If within the 15 day time period the Secretary is unable to make any identification that the child is in fact an Indian, has Indian parent(s) or Indian custodian, or has a relationship with an Indian tribe, the Secretary shall so notify the State court.

s.23.12 Payment for appointed counsel in State Indian child custody proceedings.

(a) When a State court appoints counsel for an indigent party in an Indian child custody proceeding, it shall send written notice of the appointment to the Director of the Bureau of Indian Affairs Area Office that serves the tribe of the child whose custody is at issue. The notice shall include the following:

(1) Name, address and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of the client to the child.

(4) Name of Indian child's tribe.

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(5) Copy of the petition or complaint.

(6) Copy of affidavit of indigency or other document stating the facts on which the court based its determination that the client is indigent.

(7) Certification by the court that State law makes no provision for appointment of counsel in such proceedings.

(8) Certification by the court that the client is indigent under the State standards that apply in a juvenile deliquency proceeding.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the Bureau of Indian Affairs unless:

(1) the ligigation does not involve a child custody proceeding as defined in 25 U.S.C. s1903(1);

(2) the child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. s1903(4);

(3) the client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. s1903(9), or the child's Indian custodian as defined in 25 U.S.C. s1903(6);

(4) the court has abused the discretion accorded it under State law to determine that the client is indigent;

(5) State law provides for appointment of counsel in such proceedings; or

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(6) the notice of appointment required under s23.12(a) of this Part is incomplete.

(c) No later than 30 days after receipt of the notice of appointment required under s.23.12(a) of this Part, the Area Director shall notify the court, the client and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the Bureau of Indian Affairs. In the event that certification is denied, the notice shall include written reasons for that decision together with a statement that the Area Director's decision may be appealed to the Commissioner of Indian Affairs under the provisions of 25 C.F.R. Part 2.

(d) When determining attorney fees and expenses:

(1) The Court shall determine the amount of payments due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in juvenile delinquency proceedings.

(2) The court shall submit approved vouchers to the Area Director who certified eligibility for BIA payment under s23.12(C) of this Part together with a certification that the amount requested is reasonable under the State standards that apply in determining fees and expenses for appointed counsel in juvenile delinquency proceedings.

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(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher required under s23.12(d) of this Part unless:

(1) the court has abused its discretion under State law in determining the amount of the fees and expenses;

(2) the client has not previously been certified as eligible under s23.12(c) of this Part; or

(3) funds for such payments have not been appropriated by Congress.

(f) No later than 30 days after receipt of a payment voucher required under s23.12(d) of this Part, the Area Director shall send written notice to the court, the client and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied or the amount authorized is less than the amount requested in the voucher, the notice shall include a written statement of the reasons for the decision together with a statement that the decision of the Area Director may be appealed to the Commissioner under the procedures of 25 C.F.R. Part 2.

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Subpart C-Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

s23.21 Eligibility requirements.

The governing body of any tribe or tribes, or any Indian organization, may apply for a grant under this Part.

s23.22 Purpose of grants.

(a) Grants are for the purpose of the establishment and operation of Indian child and family service programs. Examples in this specific regard are as follows:

(1) Operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children.

(2) Family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities and respite care.

(3) Employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters.

(4) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs.

(5) Subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs.

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(6) Guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(7) Home improvement programs.

(b) Preparation and implementation of child welfare codes. An example in this regard is establishment of a system for licensing or otherwise regulating Indian foster and adoptive homes.

(c) Funds made available for grants for the purposes described above may be applied as matching shares for other Federal or non-Federal grant programs as prescribed in s.23.43.

s23.23 Obtaining application instructions and materials.

Application instructions and related application materials may be obtained from Superintendents, Area Directors and the Commissioner.

s23.24 Content of application.

Application for a grant under this Part shall include:

(a) Name and address of Indian tribal governing body(s) or Indian organization applying for a grant.

(b) Descriptive name of project.

(c) Federal funding needed.

(d) Population directly benefiting from the project.

(e) Length of project.

(f) Beginning date.

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(g) Project budget catagories or items.

(h) Program narrative statement.

(i) Certification or evidence of request by Indian tribe or board of Indian organization.

(j) Name and address of Bureau office to which application is submitted.

(k) Date application is submitted to Bureau.

(l) Additional information pertaining to grant applications for funds to be used as matching shares will be requested as prescribed in s23.43.

s23.25 Application Selection Criteria.

(a) The Commissioner or designated representative, shall select Indian tribes and Indian organizations for grants under this Part whose proposals will in his judgment best promote the purposes of Title II of the Act taking into consideration the following factors:

(1) The number of actual Indian child placements outside the home, the number of Indian family breakups, and the need for directly related preventive programs, all as determined by analysis of relevant statistical and other data available from tribal and public court records and from the records of tribal, Bureau, public and private social services agencies serving Indian children and their families.

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(2) The ratio of the number of Indian children under age 18 to be served under a specific proposal to the number of all Indian children under age 18 nationally.

(3) The relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing prevention of Indian family breakup. Factors to be considered in determining relative accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Lack of programs which provide free service to indigent families;

(v) Technical barriers created by existing public or private programs;

(vii) Availability of transportation to existing programs;

(viii) Distance between the Indian community to be served under the proposal and the nearest existing program.

(4) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup.

(b) Selection for grants under this Part for on or near reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract subject to the provisions of s23.36.

(c) Selection for grants under this Part for off reservation programs shall be limited to those Indian organizations which can demonstrate local majority support from the Indian community or communities to be served by the grant. However, the Indian organization may make a subgrant or subcontract subject to the provisions of s23.36. Factors to be considered in determining local majority support include:

(1) letters of support from individuals and families to be served;

(2) local Indian community representation in and control over the Indian entity requesting the grant.

s23.36 Request from tribal governing body or Indian organization

(a) The Bureau shall only make a grant under this Part for an on or near reservation program when officially requested to do so by a tribal governing body. This request may be in the form of a tribal resolution, an endorsement included in the grant application or such other forms as the tribal constitution or current practice requires.

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(b) The Bureau shall only make a grant under this Part for an off reservation program when officially requested to do so by the governing body of an Indian organization. This request may be in one of the forms prescribed in (a) above and shall be further subject to the provisions of s23.25(c)(1)(2) above.

s23.27 Grant approval limitations.

(a) Area Office approval. Authority for approval of a grant application under this Part shall be with the Area Director when the intent, purpose and scope of the grant proposal pertains solely to an Indian tribe or tribes, or to an Indian organization representing an off-reservation community, located within that Area Director's administrative jurisdiction.

(b) Central Office approval. Authority for approval of a grant application under this Part shall be with the Commissioner when the intent, purpose and scope of the grant proposal pertains to Indian tribes or off-reservation communities representing different Area office administrative jurisdictions but located within the Commissioner's overall jurisdiction.

(c) Grant approvals under this section shall be subject to availability of funds. These funds will include those which are:

(1) Directly appropriated for implementation of this Act.

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formation relating to said adoptive placement.

Where the biological parent(s) have by affidavit requested their identity remain confidential, a copy of such affidavit shall be provided the Secretary. To assure and maintain the confidentiality of such information, it shall not be subject to the Freedom of Information Act (5 U.S.C. 552) as amended. Further, the Secretary shall authorize the use of a post office lock box to receive such information and shall designate those individuals having access to said lock box. The proper address for transmittal of such information to the Secretary shall be published in the Federal Register. In some States, a State agency has been designated to be a repository for all State court adoption information. Where such a system is operative, there is no objection to that agency assuming reporting responsibilities for the purpose of this Act.

(b) The Secretary shall redelegate the authority to receive information and maintain a central file on all State Indian adoptions to the Division of Social Services of the Bureau of Indian Affairs. These files shall be assured confidentiality and only designated persons shall have access to them. Upon the request of the adoptive parents of an Indian child, an Indian tribe, or an adopted Indian individual over the age of eighteen, the Division of Social Services shall disclose such information

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(2) Appropriated under other Acts for Bureau programs which are related to the purposes prescribed in s23.22.

s23.28 Submitting application

(a) Agency Office. An application for a grant under this Part for an on or near reservation program shall be initially submitted to the appropriate Superintendent for review and recommendation as prescribed in s23.29.

(b) Area Office. An application for a grant under this Part for an off-reservation program shall be initially submitted to the appropriate Area Director for review and action as prescribed in s23.21.

s23.29 Agency Office review and recommendation

(a) Recommendation for approval or disapproval of a grant under this Part shall be made by the Superintendent

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as may be necessary for enrollment or determining any rights or benefits associated with membership.

The Secretary shall redelegate the authority to the Chief Tribal Enrollment Officer of the Bureau of Indian Affairs for the disclosure of enrollment information relating to an adopted Indian child, where the biological parents have by affidavit requested anonymity. In such cases, the Chief Tribal Enrollment Officer shall certify to the child's tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by said tribe.

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Title 25--Indians

CHAPTER I - BUREAU OF INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR

SUBCHAPTER B -- LAW AND ORDER

PART 13 - Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

§ 13.1 Purpose.

The regulations of this Part establish the procedures by which an Indian tribe that occupies territory that has become subject to concurrent or exclusive state jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), or pursuant to any other federal statute, may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, P.L. 95-608, 92 Stat 3069, 25 U.S.C. 1918.

§ 13.2 Contents of reassumption petition.

A petition to reassume jurisdiction over Indian child custody proceedings and the accompanying plan shall contain the following information in sufficient detail to permit the Secretary to determine whether reassumption is feasible:

(a) Full name, address and telephone number of the tribe which is petitioning to reassume jurisdiction.

(b) A resolution by the tribal governing body supporting the petition and plan. If the territory involved is occupied by more than one tribe, the governing body of each tribe involved must adopt such a resolution.

(c) The proposed date on which jurisdiction would be reassumed.

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(d) Citation of the statute or statutes that resulted in giving the state jurisdiction over Indian child custody proceedings arising in the area covered by the petition.

(e) Legal description of the territory over which jurisdiction will be reassumed together with a statement of the size of the territory in square miles.

(f) Total population, both Indian and non-Indian of the affected territory.

(g) Total number of Indian children residing in the affected territory.

(h) Total number of members in the petitioning tribe or tribes.

(i) Current criteria for membership in the tribe or tribes.

(j) Explanation of procedure by which a member of the public may determine whether a particular individual is a member of the tribe or tribes.

(k) Citation to provision in tribal constitution or similar governing document that authorizes the tribal governing body to exercise jurisdiction over Indian child custody matters.

(l) Description of judicial system that has been or will be established to adjudicate child custody disputes. The description shall include an organization chart and budget for the court. The source and amount of any nontribal funds that will be used to fund the court shall be identified.

(m) Copy of any tribal ordinances or court rules establishing procedures or rules for the adjudicating of Indian child custody matters.

(n) Description of support services (such as social service personnel and child care facilities) that will be available to the tribe or tribes when jurisdiction is reassumed.

(o) Estimate of the number of child custody cases expected during a year together with an explanation of how the number was estimated.

(p) Copy of any tribal agreements with states, other tribes or non-Indian local governments relating to child custody matters.

§13.3 Criteria for approval of reassumption petitions.

The Secretary shall approve a tribal petition to reassume jurisdiction over Indian child custody matters if:

(a) the territory affected by the petition was previously subject to tribal jurisdiction and is presently occupied by the tribe;

(b) the constitution or other governing document of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercize jurisdiction over Indian child custody matters;

(c) the information and documents required by §13.2 of this Part have been provided;

(d) a tribal judicial system has been established that is capable of adjudicating child custody matters in a manner that meets the requirements of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.*;

(e) child care services sufficient to meet the needs of any child the tribal judicial system finds must be removed from parental custody are available; and

(f) the tribe or tribes have established a procedure for clearly identifying who is a member of the tribe or is eligible for membership.

§13.4 Technical assistance prior to petitioning.

(a) Upon the request of a tribe, desiring to reassume jurisdiction over Indian child custody matters, BIA agency and area offices shall provide technical assistance to enable the tribe to meet the requirements for Secretarial approval of the petition.

(b) Upon the request of such a tribe, to the extent funds are available, the BIA may provide funding to assist the tribe in developing the judicial and child care services that will be needed when jurisdiction is reassumed.

§13.5 Secretarial review procedure.

(a) Upon receipt of the petition the Secretary shall cause to be published in the Federal Register a notice stating that the petition has been received and is under review and that it may be inspected and copied at the BIA agency office that serves the petitioning tribe.

(b) The Secretary shall publish a notice in the Federal Register stating whether the petition has been approved or disapproved at least 45 days after the petition was received. Notice that a petition has been disapproved shall be published no later than 75 days after receipt. Notice that a petition has been approved shall be published on a date requested by the petitioning tribe or within 75 days after receipt--whichever is later.

(c) Notice of approval shall include a legal description of the territory subject to the reassumption of jurisdiction and shall state the date on which the reassumption becomes effective.

(d) Notice that a petition has been disapproved shall state the reasons for the disapproval.

§13.5 Finality of decision by the Secretary.

The decision of the Secretary to approve or disapprove a tribal petition is final for the Department.

§13.6 Technical assistance after disapproval.

If a petition is disapproved, the BIA shall immediately offer technical assistance to the tribal governing body for the purpose of overcoming the defect in the petition or plan that resulted in the disapproval.

Calendar No. 550

95th Congress } SENATE { Report
1st Session } { No. 95–597

THE INDIAN CHILD WELFARE ACT OF 1977

November 3 (legislative day, November 1), 1977.—Ordered to be printed

Mr. Abourezk, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1214]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1214) to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert instead the following:

That this Act may be cited as the "Indian Child Welfare Act of 1977".

FINDINGS

Sec. 2. Recognizing the special relations of the United States with the Indian and Indian tribes and the Federal responsibility for the care of the Indian people, the Congress finds that:

(a) An alarming high percentage of Indian children living within both urban communities and Indian reservations, are separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies and are placed in institutions (including boarding schools), or in foster or adoptive homes, usually with non-Indian families.

(b) The separation of Indian children from their families frequently occurs in situations where one or more of the following circumstances exist: (1) the natural parent does not understand the nature of the documents or proceedings involved; (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights; (3) the agency officials involved are unfamiliar with, and often disdainful of Indian culture and society; (4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and (5) responsible tribal authorities are not consulted about or even informed of the nontribal government actions.

(c) The separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally underairable. For the child, such separation can cause

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a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair. For Indians generally, the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.

DECLARATION OF POLICY

SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to establish standards for the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, discourage unnecessary placement of Indian children in boarding schools for social rather than educational reasons, assist Indian tribes in the operation of tribal family development programs, and generally promote the stability and security of Indian families.

DEFINITIONS

SEC. 4. For purposes of this Act:

(a) "Secretary", unless otherwise designated, means the Secretary of the Interior.

(b) "Indian" means any person who is a member of or who is eligible for membership in a federally recognized Indian tribe.

(c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided by the Bureau of Indian Affairs to Indians because of their status as Indians, including any Alaska Native villages, as listed in section II(b)(1) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697).

(d) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(e) "Tribal court" means any Court of Indian Offenses, any court established, operated, and maintained by an Indian tribe, and any other administrative tribunal of a tribe which exercise jurisdiction over child welfare matters in the name of a tribe.

(f) "Nontribal public or private agency" means any Federal, State or local government department, bureau, agency or other office, including any court other than a tribal court, and any private agency licensed by a State or local government, which has jurisdiction or which performs functions and exercises responsibilities in the fields of social services, welfare and domestic relations, including child placement.

(g) "Reservation" means Indian country as defined in title 18, United States Code, Sec. 1151, and as used in this Act, shall include lands within former reservations where the tribes still maintain a tribal government, and lands held by Alaska Native villages under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688). In a case where it has been judicially determined that a reservation has been diminished, the term "reservation" shall include lands within the last recognized boundaries of such diminished reservation prior to enactment of the allotment or pending statute which caused such diminishment.

(h) "Child Placement" means any proceedings, judicial, quasi-judicial, or administrative, voluntary or involuntary, and public or private action(s) under which an Indian child is removed by a nontribal public or private agency from (1) the legal custody of his parent or parents, (2) the custody of any extended family member in whose care he has been left by his parent or parents, or (3) the custody of any extended family member who otherwise has custody in accordance with Indian law or custom, or (4) under which the parental or custodial rights of any of the above mentioned persons are impaired.

(i) "Parent" means the natural parent of an Indian child or any person who has adopted an Indian child in accordance with State, Federal, or tribal law or custom.

(j) "Extended family member" means any grandparent, aunt, or uncle (whether [illegible] blood or marriage), brother or sister, brother or sister-in-law, niece or nephew, first or second cousin, or stepparent whether by blood, or adoption, over the age of eighteen or otherwise emancipated, or as defined by tribal law or custom.

TITLE I—CHILD PLACEMENT JURISDICTION AND STANDARDS

SEC. 101. (a) No placement of an Indian child, except as provided in this Act shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless (1) his parent or parents and the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody according to tribal law or custom, has been accorded not less than thirty days prior written notice of the placement proceeding, which shall include an explanation of the child placement proceedings, a statement of the facts upon which placement is sought, and a right: (A) to intervene in the proceedings as an interested party; (B) to submit evidence and present witnesses on his or her own behalf; and (C) to examine all reports or other documents and files upon which any decision with respect to child placement may be based; and (2) the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been made available and proved unsuccessful.

(b) Where the natural parent or parents of an Indian child who falls within the provisions of this Act, or the extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, opposes the loss of custody, no child placement shall be valid or given any legal force and effect in the absence of a determination, supported by clear and convincing evidence, including testimony by qualified expert witnesses, that the continued custody of the child by his parent or parents, or the extended family member in whose care the child has been left, or otherwise has custody in accordance with tribal law or custom, will result in serious emotional or physical damage. In making such determination, poverty, crowded or inadequate housing, alcohol abuse or other nonconforming social behaviours on the part of either parent or extended family member in whose care the child may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, shall not be deemed prima facie evidence that serious physical or emotional damage to the child has occurred or will occur. The standards to be applied in any proceeding covered by this Act shall be the prevailing social and cultural standards of the Indian community in which the parent or parents or extended family member resides or with which the parent or parents or extended family member maintains social and cultural ties.

(c) In the event that the parent or parents of an Indian child consent to a child placement, whether temporary or permanent, such placement shall not be valid or given any legal force and effect, unless such consent is voluntary, in writing, executed before a judge of a court having jurisdiction over child placements, and accompanied by the witnessing judge's certificate that the consent was explained in detail, was translated into the parent's native language, and was fully understood by him or her. If the consent is to a nonadoptive child placement, the parent or parents may withdraw the consent at any time for any reason, and the consent shall be deemed for all purposes as having never been given. If the consent is to an adoptive child placement, the parent or parents may withdraw the consent for any reason at any time before the final decree of adoption: Provided, that no final decree of adoption may be entered within ninety days after the birth of such child or within ninety days after the parent or parents have given written consent to the adoption, whichever is later. Consent by the parent or parents of an Indian child given during pregnancy or within ten days after the birth of the child shall be conclusively presumed to be involuntary. A final decree of adoption may be set aside upon a showing that the child is again being placed for adoption, that the adoption did not comply with the requirements of this Act or was otherwise unlawful, or that the consent to the adoption was not voluntary. In the case of such a failed adoption, the parent or parents or the extended family member from whom custody was taken shall be afforded an opportunity to reopen the proceedings and petition for return of custody. Such prior parent or custodian shall be given thirty days notice of any proceedings to set aside or vacate a previous decree unless the prior parent or custodian waives in writing any right to such notice.

(d) No placement of an Indian child, except as otherwise provided by this Act, shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately threatened, unless his parent or parents, or the extended family member in whose care the child may have been left or who otherwise has custody in accordance with tribal law or custom, has been afforded the opportunity to be represented by counsel or lay advocate as required by the court having jurisdiction.

(e) Whenever an Indian child previously placed in foster care or temporary placement by any nontribal public or private agency is committed or placed, either voluntarily or involuntarily in any public or private institution, including but not limited to a corectional facility, institution for juvenile delinquents, mental hospital or halfway house, or is transferred from one foster home to another, notification shall forthwith be made to the tribe with which the child has significant contacts and his parent or parents or extended family member from whom the child was taken. Such notice shall include the exact location of the child's present placement and the reasons for changing his placement. Notice shall be made thirty days before the legal transfer of the child effected, if possible, and in any event within ten days thereafter.

SEC. 102. (a) In the case of any Indian child who resides within an Indian reservation which maintains a tribal court which exercises jurisdiction over child welfare matters, no child placement shall be valid or given any legal force and effect, unless made pursuant to an order of the tribal court. In the event that a duly constituted Federal or State agency or any representation thereof has good cause to believe that there exists an immediate threat to the emotional or physical well-being of an Indian child, such child may be temporarily removed from the circumstances giving rise to the danger provided that immediate notice shall be given to the tribal authorities, the parents, and the extended family member in whose care the child may have been left or who otherwise has custody according to tribal law or custom. Such notice shall include the child's exact whereabouts and the precise reasons for removal. Temporary removals beyond the boundaries of a reservation shall not affect the exclusive jurisdiction of the tribal court over the placement of an Indian child.

(b) In the case of an Indian child who resides within an Indian reservation which possesses but does not exercise jurisdiction over child welfare matters, no child placement, by any nontribal public or private agency shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless such jurisdiction is transferred to the state pursuant to a mutual agreement entered into between the State and the Indian tribe pursuant to subsection (j) of this section. In the event that no such agreement is in effect, the Federal agency or agencies servicing said reservation shall continue to exercise responsibility over the welfare of such child.

(c) In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a state, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and seriously threatened, unless the Indian tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party in the child placement proceedings. In the event that the intervening tribe maintains a tribal court which has jurisdiction over child welfare matters, jurisdiction shall be transferred to such tribe upon its request unless good cause for refusal is affirmatively shown.

(d) In the event of a temporary placement or removal as provided in subsections (a), (b), and (c) above, immediate notice shall be given to the parent or parents, the custodian from whom the child was taken if other than the parent or parents, and the chief executive officer or such other person as such tribe or tribes may designate for receipt of notice. Such notice shall include the child's exact whereabouts, the precise reasons for his or her removal, the proposed placement plan, if any, and the time and place where hearings will be held if a temporary custody order is to be sought. In addition, where a tribally

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operated or licensed temporary child placement facility or program is available, such facilities shall be utilized. A temporary placement order must be sought at the next regular session of the court having jurisdiction and in no event shall any temporary or emergency placement exceed 72 hours without an order from the court of competent jurisdiction.

(e) For the purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents, or the extended family member in whose care he may have been left by his parent or parents or who otherwise has custody in accordance with tribal law or custom, is resident.

(f) For the purposes of this Act, whether or not a nonreservation resident Indian child has significant contacts with an Indian tribe shall be an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship. A finding that such Indian child does not have significant contacts with an Indian tribe sufficient to warrant a transfer of jurisdiction to a tribal court under subsection (c) of this section does not waive the preference standards for placement set forth in section 103 of this Act.

(g) It shall be the duty of the party seeking a change of the legal custody of an Indian child to notify the parent or parents, the extended family members from whom custody is to be taken, and the chief executive of any tribe or tribes with which such child has significant contacts by mailing prior written notice by registered mail to the parent or parents, or extended family member, and the chief executive officer of the tribe, or such other persons as such tribe or tribes may designate: *Provided*, that the judge or hearing officer at any child placement proceeding shall make a good faith determination of whether the child involved is Indian and, if so, whether the tribe or tribes with which the child has significant contacts were timely notified.

(h) Any program operated by a public or private agency which removes Indian children from a reservation area and places them in family homes as an incident to their attendance in schools located in communities in off-reservation areas and which are not educational exemptions as defined in the Interstate Compact on the Placement of Children shall not be deemed child placements for the purposes of this Act. Such programs shall provide the chief executive officer of said tribe with the same information now provided to sending and receiving States which are members of the Interstate Compact on the Placement of Children. This notification shall be facilitated by mailing written notice by registered mail to the chief executive officer or other such person as the tribe may designate.

(i) Notwithstanding the Act of August 15, 1953 (67 Stat. 588), as amended, or any other Act under which a state has assumed jurisdiction over a child welfare of any Indian tribe, upon sixty days written notice to the State in which it is located, any such Indian tribe may reassume the same jurisdiction over such child welfare matters as any other Indian tribe not affected by such acts, *Provided*, That such Indian tribe shall first establish and provide mechanisms for implementation of such matters which shall be subject to the review and approval of the Secretary of the Interior. In the event, the Secretary does not approve the mechanisms which the tribe proposes within sixty days, the Secretary shall provide such technical assistance and support as may be necessary to enable the tribe to correct any deficiencies which he has identified as a cause for disapproval. Following approval by the Secretary, such reassumption shall not take effect until sixty days after the Secretary provides notice to the State which is asserting such jurisdiction. Except as provided in section 102(c), such reassumption shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such actions or proceeding shall abate by reason of such reassumption.

(j) State and tribes are specifically authorized to enter into mutual agreements or compacts with each other, respecting the care, custody and jurisdictional authority of each party over any matter within the scope of this Act, including agreements which provide for transfer of jurisdiction on a case by case basis, and agreements which provide for concurrent jurisdiction between the states and the tribes. The provisions of the act of August 15, 1953 (67 Stat. 588), as amended by title IV of the act of April 11, 1968 (82 Stat. 78) shall not limit the powers of states and tribes to enter into such agreements or compacts. Any such agreements shall be subject to revocation by either party upon sixty days written notice to the other. Except as provided in section 102(c), such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such action or proceeding shall abate by reason of such revocation, and, *Provided further*, such agreements shall not waive the rights of any tribe to notice and intervention as provided in this act nor shall they alter the order of preference in child placement provided in this title. The Secretary of the Interior shall have sixty days after notification to review any such mutual agreements or compacts or any revocation thereof and in the absence of a disapproval for good cause shown, such agreement, compact or revocation thereof shall become effective.

(k) Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act.

SEC. 103. (a) In offering for adoption an Indian child, in the absence of good cause shown to the contrary, a preference shall be given in the following order: (1) to the child's extended family; (2) to an Indian home on the reservation where the child resides or or has significant contacts; (3) to an Indian home where the family head or heads are members of the tribe with which the child has significant contacts; and (4) to an Indian home approved by the tribe: *Provided, however*, That each Indian tribe may modify or amend the foregoing order of preference and may add or delete preference categories by resolution of its government.

(b) In any nonadoptive placement of an Indian child, every nontribal public or private agency, in the absence of good cause shown to the contrary, shall grant preferences in the following order: (1) to the child's extended family; (2) to a foster home, if any, licensed or otherwise designated by the Indian tribe occupying the reservation of which the child is a resident or with which the child has significant contacts; (3) to a foster home, if any, licensed by the Indian tribe of which the child is a member or is eligible for membership; (4) to any other foster home within an Indian reservation which is approved by the Indian tribe of which the child is a member or is eligible for membership in or with which the child has significant contacts; (5) to any foster home run by an Indian family; and (6) to a custodial institution for children operated by an Indian organization: *Provided, however*, That each Indian tribe may modify or amend the foregoing order of preferences, and may add or delete perference categories, by resolution of its government body.

(c) Every nontribal public or private agency shall maintain a record evidencing its efforts to comply with the order of preference provided under subsections (a) and (b) in each case of an Indian child placement. Such records shall be made available, at any time upon request of the appropriate tribal government authorities.

(d) Where an Indian child is placed in a foster or adoptive home, or in an institution, outside the reservation of which the child is a resident or with which he maintains significant contacts, pursuant to an order of a tribal court, the tribal court shall retain continuing jurisdiction over such child until the child attains the age of eighteen.

SEC. 104. In order to protect the unique rights associated with an individual's membership in an Indian tribe, after an Indian child who has been previously placed attains the age of eighteen, upon his or her application to the court which entered the final placement decree, and in the absence of good cause shown to the contrary, the child shall have the right to learn the tribal affiliation of his parent or parents and such other information as may be necessary to protect the child's rights flowing from the tribal relationship.

SEC. 105. In any child placement proceeding within the scope of this Act, the United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the laws of any Indian tribe applicable to a proceeding under the Act and to any tribal court orders relating to the custody of a child who is the subject of such a proceeding.

TITLE II—INDIAN FAMILY DEVELOPMENT

SEC. 201. (a) The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to carry out or make grants to Indian tribes and Indian organizations for the purpose of assisting such tribes or orga-

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nizations in the establishment and operation of Indian family development programs on or near reservations, as described in this section, and in the preparation and implementation of child welfare codes. The objective of every Indian family development program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or parents, or the custody of any extended family member in whose care he has been left by his parent or parents, or one who otherwise has custody according to tribal law or custom, shall be effected only as a last resort. Such family development programs may include, but are not limited to, some or all of the following features:

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance of family development centers, as defined in subsection (b) hereof;

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment of Indian families and Indian children;

(5) home improvement programs;

(6) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(7) education and training of Indians, including tribal court judges and staff, in skills relating to child welfare and family assistance programs;

(8) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(9) guidance, legal representation and advice to Indian families involved in tribal or non-tribal child placement proceedings.

(b) Any Indian foster or adoptive home licensed or designated by a tribe (1) may accept Indian child placements by a non-tribal public or private agency and State funds in support of Indian children; and (2) shall be granted preference in the placement of an Indian child in accordance with title I of this Act. For purposes of qualifying for assistance under any federally assisted program, licensing by a tribe shall be deemed equivalent to licensing by a state.

(c) Every Indian tribe is authorized to construct, operate, and maintain a family development center which may contain, but shall not be limited to:

(1) facilities for counseling Indian families which face disintegration and, where appropriate, for the treatment of individual family members;

(2) facilities for the temporary custody of Indian children whose natural parent or parents, or extended family member in whose care he has been left by his parent or parents or one who otherwise has custody according to tribal law or custom, are temporarily unable or unwilling to care for them or who otherwise are left temporarily without adequate adult supervision by an extended family member.

SEC. 202. (a) The Secretary is also authorized, under such rules and regulations as he may prescribe to carry out, or to make grants to Indian organizations to carry out, off-reservation Indian family development programs, as described in this Section.

(b) Off-reservation Indian family development programs, operated through grants with local Indian organizations, may include, but shall not be limited to, the following features:

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation and maintenance of family development centers providing the facilities and services set forth in section 201(d);

(3) family assistance, including homemakers and home counselors, day care, after school care, and employment, recreational activities, and respite services;

(4) provision for counseling and treatment both of Indian families which face disintegration and, where appropriate, of Indian foster and adoptive children; and

(5) guidance, representation, and advice to Indian families involved in child placement proceedings before non-tribal public and private agencies.

SEC. 203. (a) In the establishment, operation, and funding of Indian family development programs, both on or off-reservation, the Secretary may enter into agreements or other cooperative arrangements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare.

(b) There are authorized to be appropriated $26,000,000 during fiscal year 1979; and, such sums thereafter as may be necessary during each subsequent fiscal year in order to carry out the purposes of this title.

TITLE III—RECORD KEEPING, INFORMATION AVAILABILITY AND TIMETABLES

SEC. 301. (a) The Secretary of the Interior is authorized and directed under such rules and regulations as he may prescribe, to collect and maintain records in a single, central location of all Indian child placements which are effected after the date of this Act which records shall show as to each such placement the name and tribal affiliation of the child, the names and addresses of his natural parents and the extended family member, if any, in whose care he may have been left, the names and addresses of his adoptive parents, the names and addresses of his natural siblings, and the names and locations of any tribal or nontribal public or private agency which possess files or information concerning his placement. Such records shall not be open for inspection or copying pursuant to the Freedom of Information Act (80 Stat. 381), as amended, but information concerning a particular child placement shall be made available in whole or in part, as necessary to an Indian child over the age of eighteen for the purpose of identifying the court which entered his final placement decree and furnishing such court with the information specified in section 104 or to the adoptive parent or foster parent of an Indian child or to an Indian tribe for the purpose of assisting in the enrollment of said Indian child in the tribe of which he is eligible for membership and for determining any rights or benefits associated with such membership. The records collected by the Secretary pursuant to this Section shall be privileged and confidential and shall be used only for the specific purposes set forth in the Act.

(b) A copy of any order of any nontribal public or private agency which effects the placement of an Indian child within the coverage of this Act shall be filed with the Secretary of the Interior by mailing a certified copy of said order within ten days from the date such order is issued. In addition, such public or private agency shall file with the Secretary of the Interior any further information which the Secretary may require by regulations in order to fulfill his record keeping functions under this Act.

SEC. 302. (a) The Secretary is authorized to perform any and all acts and to make rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act.

(b)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest agencies in the consideration and formation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively.

(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act

(c) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules or regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, respectively, and shall, to the extent practicable, consult with the tribes, organizations, and agencies specified

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in subsection (b)(1) of this section, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools contributes to the breakup of Indian families and denies Indian children the equal protection of the law.

(b) The Secretary is authorized and directed to prepare and to submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs and Committee on Education and Labor of the United States House of Representatives, respectively, within one year from the date of enactment of this Act, a plan, including a cost analysis statement, for the provision to Indian children of schools located near the students home. In developing this plan, the Secretary shall give priority to the need for educational facilities for children in the elementary grades.

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PURPOSE

S. 1214, the Indian child Welfare bill of 1977 is a multipurpose piece of legislation. Title I is designed to clarify who has jurisdiction over Indian child placements and establish standards for child placement proceedings which will insure that Indian parents will be accorded a fair hearing when child placement is at issue. When foster home and adoptive placement of an Indian child becomes necessary, the bill provides that a preference should be given to the child's extended family and if such placement is not facilitated to Indian homes and institutions. The bill states that it is the duty of the U.S. Government to protect the special relationship which exists between an Indian child and his tribe. In order to protect this unique relationship and to insure that a previously placed Indian child is accorded those benefits which he may receive as a tribal member, the bill requires that all nontribal public or private agencies shall make available, upon request by a previously placed Indian child over the age of 18, all information which he needs to establish enrollment and obtain those benefits to which he is entitled as a tribal member. Finally, the legislation requires all states, the United States and federally recognized tribal governments to accord full faith and credit to the laws of any Indian tribe applicable to a proceeding under this act and to any tribal court orders relating to the custody of a child who is the subject of such a proceeding.

Title II authorizes the Secretary of the Interior to make grants directly to Indian tribes and organizations for the purpose of establishing Indian family development programs both on and off the reservation. These program funds may be used for such purposes as hiring child welfare staffs, construction of child welfare facilities, providing counseling and legal representation to Indian children and families involved in a placement proceeding and developing and licensing Indian foster and adoptive homes.

Title III authorizes and directs the Secretary of the Interior to collect and maintain records of all Indian child placements from the enactment of this act forward and provides the timetables for implementation of this bill.

Title IV requires the Secretary of Interior to do a study of the impact that the absence of locally convenient day school facilities has on Indian children. A large number of Indian children are forced to leave their family homes and reside in boarding school facilities many miles from home because the law requires them to attend school and no local program is available. Title IV requires the Secretary to report on the number of Indian children affected in this way and provide a plan for redial action in this area.

SUMMARY OF MAJOR PROVISIONS

This legislation will, for the first time, establish legislative standards to govern the placement of Indian children in foster or adoptive care settings. The act establishes an order of preferences to be accorded Indian children in placing them in foster care or adoptive settings, specifically, first preference to be accorded members of the child's extended family, then to Indian homes on reservations where the child may reside, or to tribally licensed homes. The act provides that tribes may alter this statutory order of preference by enacting ordinances of their own establishing alternative preference orders.

The act statutorily defines the respective jurisdiction of State and tribal governments in matters relating to child placements. To the extent the act provides for jurisdictional division between States and tribes, it is declarative of law as developed by judicial decision. However, there are new provisions too. The act provides that tribes may request transfers of placement cases from State to tribal courts and that in the absence of good cause to the contrary such transfers shall be ordered; it authorizes tribes presently under State civil and criminal jurisdiction by virtue of Federal law to apply to the Secretary of Interior for return of jurisdiction over child placement matters to the tribes (this includes tribes whose reservations have been disestablished or diminished by virtue of Federal law, or who are otherwise under State jurisdiction, including tribes in Oklahoma); it authorizes States and tribes to enter into mutual agreements regarding the care, custody and jurisdiction over Indian children; and it provides for full faith and credit to be accorded the laws and court orders of Indian tribes relevant to child placement matters.

The act also provides that tribes shall receive the same information regarding informal child placements for educational programs operated by non-governmental entities across state lines or outside reservation boundaries as is now provided to States who are members of the Interstate Compact on the Placement of Children. It establishes procedural safeguards for parents or extended family members in

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child placement proceedings by nontribal public or private agencies; establishes a right of tribes to receive notification of placement proceedings in state or local courts and provides for a right of tribal intervention in such proceedings. An Indian child who has been placed in adoptive, foster care or other setting is authorized upon attaining the age of eighteen to obtain information regarding his or her placement as may be needed to qualify for enrollment in his or her tribe of origin and for other benefits and property rights to which he or she may be entitled because of Indian status.

Title II of this act authorizes the Secretary of the Interior to make grants to Indian tribes and Indian organizations to carry out Indian family development programs. Some of the programs for which funding is authorized by this legislation are already provided either by the BIA or the Indian Health Service, but other program authorizations are new. Of particular significance are the authorizations of grants to tribes and Indian organizations to provide legal representation to families involved in child placement proceedings, the authorization of funds for the establishment of tribal licensing procedures for Indian foster care homes, and the authorization of funds to aid in the support of Indian children placed in the adoptive or foster care of extended family members. The authorization of the Secretary of the Interior to make grants to Indian organizations to carry out family development programs in off-reservation settings is also new.

Title III of the act authorizes and directs the Secretary of the Interior to collect and maintain records relating to future adoptive and foster care placements of Indian children. These records are confidential and exempt from the application of the Freedom of Information Act. These records will enable Congress and the Executive to monitor the application of this act and also provide an alternative system for the Secretary to assist in the establishment of Indian eligibility for tribal enrollment and qualification for other benefits and property rights when such children reach the age of 18.

Finally, title IV directs the Secretary to conduct a study on the impact which results from a lack of locally convenient day school facilities and file a report to Congress which shall contain a plan for remediation of the problem.

BACKGROUND

As early as 1973, the Senate Committee on Interior, Subcommittee on Indian Affairs, began to receive reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies. Studies by the Association on American Indian Affairs, State Welfare offices and private child welfare groups indicated that in some areas as high as 25 percent of all Indian children are being placed in institutions or in foster or adoptive homes, usually with non-Indian families. The studies also indicated that such family breakups frequently occur as a result of conditions which are temporary or remedial and where the Indian people involved do not understand the nature of the legal actions involved.

In 1974, the Senate Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs held an oversight hearing on Indian child placement. At this time testimony was received from the administration, Indian people, State representatives, tribal leaders, medical and psychiatric professionals and child welfare groups. Their statements served to solidify the above mentioned findings as well as to point out that serious emotional problems often occur as a result of placing Indian children in homes which do not reflect their special cultural needs.

Two basic concepts surfaced at the hearings. First, Indian people and child welfare experts stressed the need for adequately funded, tribally controlled family development programs which would function at the local level and would be able to exhibit a deeper cultural sensitivity toward the Indian people they serve. Second, Indian tribal leaders pointed out that Indian tribes were recognized as by the United States as sovereign governmental units and as such the final decision making powers in areas as basic as child welfare should rest within the relm of tribal jurisdiction.

Task Force IV of the American Indian Policy Review Commission addressed the issue of Indian child placement. Its findings supported the comments made by child welfare experts and Indian people at the 1974 oversight hearings. The Task Force recommenations stressed the two points previously stated in the oversight transcripts: return total jurisdiction over child welfare matters involving children from reservation areas when a tribe expresses a desire to exercise such jurisdiction and provide adequate financial assistance to tribes and organizations to allow them to establish Indian controlled family development programs at the local level. In discussing the issue and defending its recommendations the Task Force pointed to the lack of cultural sensitivity on the part of Federal, State and local agencies and to their poor record for returning Indian children to their natural parents.

The Final Report of the American Indian Policy Review Commission includes a number of recommendations which are addressed in S. 1214. It calls for exclusive jurisdiction over the welfare of those Indian children who are domiciled on an Indian reservation. The report indicates that numerous court decisions have affirmed the tribe's right to exercise jurisdiction in these areas, but States that at this time many State officials are not honoring the tribes right to act exclusively. Finally the report calls for the tribe right to notice and intervention in any nontribal placement proceeding involving one of its juvenile members.

On August 4, 1977, the Senate Select Committee on Indian Affairs held an open public hearing on S. 1214. Testimony was again received from the Administration, Indian tribes and organizations, child welfare specialists and church groups. The statements presented by these individuals pointed out that the problems which were discussed and documented in 1974 still have not been solved. Indian people again called for tribal jurisdiction in Indian child placement matters and requested congressional support in the way of increased appropriations for child welfare services. They requested that these appropriations be made directly available to the tribes to reduce unnecessary overhead costs and stressed the fact that adequate funding would have a major impact on improving the situation. Tribal witnesses indicated that some tribes such as the Quinault Nation in Washington, have

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begun work in this area and have been extremely successful. Quinault and others have shown major increases in the number of available Indian foster and adoptive homes and they have greatly decreased the number of children now in placement by as much as 40 percent.

LEGISLATIVE HISTORY

S. 1214 was introduced on April 1, 1977, sponsored by Senator James Abourezk and cosponsored by Senator Hubert Humphrey and Senator George McGovern.

Senator Abourezk sponsored a similar proposal, S. 3777, in the 94th Congress which was referred to the Senate Committee on Interior and Insular Affairs and later referred to the Subcommittee on Indian Affairs where no action was taken on it.

Hearings on S. 1214 were held on August 4, 1977, before this committee. Representatives from the National Congress on American Indians, the National Tribal Chairman's Association, various Indian tribes, the American Civil Liberties Union, the American Academy of Child Psychiatry, and the Friends Committee on National Legislation testified in support of S. 1214. Representatives of the Church of Jesus Christ of Latter-Day Saints opposed certain aspects of the private placement section of the bill which have been addressed by committee amendment. The Department of Interior and the Department of Health, Education, and Welfare, while agreeing with the concepts of S. 1214 suggested that S. 1928, a national child welfare bill proposed by the administration obviated the need for separate legislation.

The committee has taken the position that S. 1928 is not designed to address the specific needs of Indian people in the child welfare area. Because of the extreme poverty which exists on reservation areas and the unique Indian cultural differences, Indian children require special types of programs. Indian tribes have indicated a desire to play a major role in these areas, but they require technical assistance and adequate funding if they are to do an effective job. S. 1928 does not contain basic Indian provisions such as direct funding to Indian tribes and recognition of tribal courts. Even with such provisions S. 1928 still fails to address the basic jurisdictional and placement preference problems which are basic elements of S. 1214. It is a different bill designed for a different purpose.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Select Committee on Indian Affairs, in open business session on October 28, 1977, by majority vote of a quorum present recommends that the Senate pass S. 1214 if amended as described herein.

COMMITTEE AMENDMENTS

For general purposes of reorganization and clarity, the committee amended the bill by way of substitution. Listed below are the similarities and dissimilarities section by section between the committee's substitute amendment and the original printed version of S. 1214. A detailed discussion of the significant changes is given in the section-by-section analysis.

S. 1214

Section 1 is similar to Section 1 of the original version.
Section 2 is similar to Section 2 of the original version.
Section 3 is similar to Section 3 of the original version.
Section 4 is similar to Section 4 of the original version, except that:

(g) has been added to clearly define "reservation".
(h) is similar to Section 4(g) of the original version.
(i) is similar to Section 4(h) of the origial version.
(j) is similar to Section 4(i) of the original version.

TITLE I—CHILD PLACEMENT JURISDICTION AND STANDARDS

Section 101:

(a) is similar to Section 102(a) of the original version.
(b) is similar to Section 102(b) of the original version.

(c) is similar to Section 102(c) of the original version, but has been widened to address the issue of failed adoptions.

(d) is similar to Section 102(d) of the original version, but eliminates the original provision making a mandatory requirement that child and parent be accorded separate counsel.

(e) has been added to clearly address the issue of notification rights in such situations as juvenile delinquency and other temporary or foster placements.

Section 102:

(a) is similar to Section 101(a) of the original version.
(b) is similar to Section 101(b) of the original version.
(c) is similar to Section 101(c) of the original version.

(d) has been added to clarify the notification procedures in event of a temporary placement or removal.

(e) has been added to clarify the residency status of an Indian child.

(f) has been added to set forth in part the element or elements of an Indian child's significant contacts relationship with an Indian tribe.

(g) is similar to Section 101(e) of the original version.
(h) is similar to Section 101(d) of the original version.

(i) has been added to allow tribes to reassume jurisdiction over child welfare matters.

(j) has been added to authorize states and Indian tribes to enter into mutual agreements on jurisdictional issues.

(k) has been added to limit any changes in jurisdiction over child welfare matters to those expressly provided for in this Act.

Section 103:

(a) is similar to Section 103(a) of the original version.
(b) is similar to Section 103(b) of the original version.

(c) has been added to require an adequate record keeping of compliance with the order of placement preferences.

(d) is similar to Section 103(c) of the original version.

Section 104 is similar to but more limited than Section 104 of the original version.

Section 105 is similar to Section 105 of the original version.

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TITLE II—INDIAN FAMILY DEVELOPMENT

Sections 201, 202, and 203 have been entirely reorganized for purposes of clarity from Sections 201, 202, 203, and 204 (b, d) of the original version.

TITLE III—RECORD KEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

Section 301:

(a) is similar to Section 204(c) of the original version.

(b) has been added to require all nontribal public or private agencies to file the necessary Indian child placement information with the Secretary of the Interior.

Section 302:

(a) is similar to Section 205(a) of the original version.

(b) is similar to Section 205(b) of the original version.

(c) is similar to Section 205(c) of the original version.

TITLE IV—PLACEMENT PREVENTION STUDY

Section 401:

(a) has been added to address the lack of local and convenient day schools for Indian children.

(b) has been added to require a plan to be drawn up to provide for local and convenient day schools for Indian children.

It should be noted that the provisions of section 204(a) of the original version directing a 16-year review of all Indian child placements, and authorizing secretarial proceedings in Federal court have been entirely deleted. Also, the provisions of section 204(b) of the original version authorizing the Secretary to operate or make grants or contracts with Indian tribes or organizations to provide legal representation have been merged into the provisions of sections 201 and 202 of the committee's substitute bill, to limit such activity to grants to Indian tribes and organizations. Further, a significant reduction (approximately $12 million) in first year atuhorization levels is achieved by the committee's substitute bill.

SECTION-BY-SECTION ANALYSIS

Section 1—Short title

Section 2—Findings

The intent of this section is clear.

Section 3—Declaration of policy

The intent of this section is clear.

Section 4—Definitions

Subsections (a), (b), (c), and (d).—The intent of these subsections is clear.

Subsection (e).—The definition of "tribal court" is written to include administrative tribunals. This is intended to include tribally established administrative boards, commissions or other alternative tribal mechanisms which exercise adjudicatory powers or jurisdiction over child welfare matters in the name of the tribe.

Subsection (f).—The intent of the subsection is clear.

Subsection (g).—The definition of "reservation" includes Indian country as defined in title 18 United States Code, section 1151 and, for purposes of this Act, includes lands within former reservations which have been disestablished by Federal enactment or which have been judicially determined to have been diminished by an allotment or opening statute. The purpose of this definition is to include within the provision of this act tribes within the State of Oklahoma some of whose reservations may have been totally disestablished, as well as tribes such as the Sisseton-Wahpeton or the Rosebud Sioux whose reservations have recently been found by Federal court decisions to have been diminished by virtue of Federal allotment and opening statutes enacted at the turn of the century. The definition states that the territory to which the tribal authority will be recognized to extend under this act extends to the last boundaries of the reservation which were recognized immediately prior to the act which caused the diminishment or disestablishment of said reservation. The definition also includes lands held by Alaska Native villages under the Alaska Native Claims Settlement Act (89 Stat. 688).

Subsection (h).—The definition of "child placement" is intended to include proceedings against juveniles which may lead to foster care and proceedings against status offenders, i.e., juveniles who have not committed any act which would be a criminal act if they were an adult, such as truancy. It shall also include juveniles charged with minor misdemeanant behavior who would be covered by the prohibitions against incarceration in secure facilities by the Juvenile Justice and Delinquent Prevention Act of 1974 (Public Law 93-415, 41 U.S.C. 5601 et. seq.). It is not intended that the definition of "child placement" in this subsection apply to juveniles who have committed serious offenses which are a threat to the public.

Subsection (i) and (j).—The intent of these subsections is clear.

TITLE I—CHILD PLACEMENT JURISDICTION AND STANDARDS

Section 101

Subsection (a).—The intent of this subsection is clear.

Subsection (b).—The intent of this subsection is to establish standards and guidelines to given the placement of Indian children when the parents or extended family member oppose the loss of custody. The court, in considering whether to order a nonvoluntary placement, must determine on the basis of clear and convincing evidence that continued custody by the parent or other family member will result in serious emotional or physical damage to the child. Further, the physical and social conditions surrounding such custody are to be evaluated in the context of the prevailing social and cultural standards of the Indian community. Indian community standards regarding emotionally or physically harmful conditions for a child may be significantly different, and assumption subject to the judgment of the court.

Subsection (c).—The intent of this subsection is clear.

Subsection (d).—The intent of this subsection is to establish the minimum permissible procedural safeguards to be afforded parents and children in child placement proceedings before nontribal courts. It is not the intent of this subsection to in any way waive or diminish the

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procedural safeguards which would otherwise be applicable under the laws governing such courts.

Subsection (e).—The intent of this subsection is clear.

Section 102

Subsection (a).—Except for the provision regarding temporary removal of an Indian child in circumstances in which there is a serious and immediate threat to the emotional or physical well being of said child, the intent of this subsection is clear. The exclusive jurisdiction of the tribe is well founded in the law, *Fisher* v. *District Court*, 424 U.S.C. 382 (1976). The provision regarding temporary removal must be read in conjunction with (1) the last sentence in this subsection providing for continued exclusive jurisdiction of the tribe even where the child is removed beyond the boundaries of the reservation, and (2) the provision of subsection (d) which requires immediate notification to the chief executive officer of the tribe or his designate, utilization of tribally operated or licensed placement facilities, and requires a proceeding in tribal court within 72 hours of such removal unless the child is returned.

Subsection (b).—The provisions of this subsection are also declarative of existing law which excludes Indians within federally recognized reservations from the application of State laws.

Subsection (c).—The intent of this subsection is clear. The provisions are new to the law and establish the right of a tribe to participate in proceedings in State courts involving placement of a child who has significant contacts with said tribe, and also authorizes such tribe to seek transfer of jurisdiction to its own courts.

Subsection (d) and (e).—The intent of these subsections is clear.

Subsection (f).—The intent of this subsection is to supply guidelines to courts in determining the application of the jurisdictional provisions of subsection (c). The "significant contact" test coupled with the "good cause for refusal" provisions of subsection (c) are designed to provide State courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child.

Subsection (g).—The provisions of this subsection require notification to the tribe or tribes with which an Indian child has significant contacts. It is very possible for a child to have significant contacts with more than one tribe. In such a case, notice must be given to each of the tribes with which the child has such contacts, and each such tribe shall be entitled to the rights of intervention provided for in this act.

Subsection (h).—This section requires those programs which remove Indian children from reservation area and place them in private homes located in other jurisdictional areas as an incident to their attendance in school, and which are not educational exemptions under article II(d) of the Interstate Compact on the Placement of Children, to provide the Chief Executive Officer of the tribe occupying the reservation from which said Indian child is removed with the information specified in Regulation II of the Interstate Compact on the Placement of Children (a copy of which is printed in the appendix of this report). In the event that a question arises as to who is the Chief Executive Officer of a given reservation the information shall be provided to the person who the Secretary of the Interior or his representative certifies to be the Chief Executive Officer. The intent of this tion is to exempt placements under these programs from the application of all other provisions of this act except those explicitly provided for in this subsection.

Subsection (*i*).—The intent of this subsection is clear. This subsection affects existing statutory law in that it authorizes tribes which have been placed under the civil jurisdiction of a state by the act of August 15, 1953 (67 Stat. 588) or any other Federal act under which a state has assumed civil jurisdiction, to reassume the same jurisdiction over child welfare matters as any other Indian tribe not affected by such acts possesses. The provisions of this section include tribes in Oklahoma.

Subsection (*j*).—The intent of this subsection is to give to states and tribes the broadest possible latitude in the types of agreements they may enter into. It is the intent of this subsection to free the tribes and states from the rigid requirements of Public Law 83–280 (67 Stat. 588) as amended by title IV of the Act of April 11, 1968 (82 Stat. 78), (*See*, *Kennerly* v. *District Court*, 400 U.S. 423 (1971). The language authorizing tribes and states to enter into agreements regarding transfer of jurisdiction on a case by case basis is intended to provide a sound legal basis for tribes to authorize transfers of jurisdiction of specific offenders to states for custodial or rehabilitative services. The legal authority of tribes and states to enter into such cooperative agreements is legally questionable at this time. (*See*, *Blackwolf* v. *District Court*, 158 Mont. 523 (1972).

Subsection (*k*).—The intent of this subsection is clear.

Section 103

Subsections (*a*), (*b*), (*c*), *and* (*d*).—The intent of these subsections is clear.

Section 104

This section has been amended to provide that the child shall have a right to learn the tribal affiliation of his parent or parents and such other information as may be necessary to protect the child's rights flowing from the tribal relationship. As originally drafted, this section automatically entitled the child to learn the actual names and addresses of his natural parent or parents. It is the intent of this section as amended to authorize the release of only such information as is necessary to establish the child's rights as an Indian person. Upon a proper showing to a court that knowledge of the names and addresses of his or her natural parent or parents is needed, only then shall the child be entitled to the information under the provision of this section.

Section 105

The intent of this section is clear.

TITLE II—INDIAN FAMILY DEVELOPMENT

Section 201

Subsections (*a*), (*b*), *and* (*c*).—The intent of these subsections is clear.

Section 202

Subsections (*a*) *and* (*b*).—The intent of these subsections is clear.

Section 203

Subsections (a) and (b).—The intent of these subsections is clear.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

Section 301

Subsection (a).—This subsection authorizes and directs the Secretary of the Interior to collect and maintain records relating to future adoptive and foster care placements of Indian children. These records are to be confidential and exempt from the application of the Freedom of Information Act. Such records will enable Congress and the Executive to monitor the application of this act and also provide an alternative system for the Secretary to assist in the establishment of Indian eligibility for tribal enrollment and qualification for other benefits and property rights when such children reach the age of 18.

Subsections (b) and (c).—The intent of these subsections is clear.

TITLE IV—PLACEMENT PREVENTION STUDY

Section 401

Subsections (a) and (b).—The intent of these subsections is clear. It is the expectation of the committee that the Secretary of the Interior or his representative will work directly with the staffs of the appropriate Senate and House committees to determine the particulars of said plan and its report form.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1214 as provided by the Congressional Budget Office is outlined below:

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1214.
2. Bill title: Indian Child Welfare Act of 1977.
3. Bill status: As reported by the Senate Select Committee on Indian Affairs, October 28, 1977.
4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and authorizes grants to Indian tribes and Indian organizations for the establishment and operation of Indian family development centers. This bill is subject to subsequent appropriation action.
5. Cost estimate:

[By fiscal years, in millions of dollars]

Authorization levels:	
1979	26.0
1980	30.7
1981	39.7
1982	50.2
1983	62.0
Projected total outlays:[1]	
1979	6.4
1980	23.5
1981	30.6
1982	46.8
1983	[illegible]

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[1] [illegible]

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The costs of this bill fall within budget function 500.

6. Basis for estimate: The authorization level for fiscal year 1979 is as stated in S. 1214. That level assumed the building of 30 family development centers at a cost of $610 thousand each as well as $7.1 million to cover costs of family development services such as legal services and home repairs. The Bureau of Indian Affairs has indicated that there are 150 eligible Indian tribes and Indian organizations eligible for family development centers. Therefore, the authorization levels in the outyears assume that 30 new centers will be authorized annually. In addition, it is assumed that each center will be operated by 15 professional and support personnel in order to carry out the provisions of this bill.

The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.

The spendout on the development center construction is spread over three years, while the spendout on the other services is over a two year period. The fiscal year 1979 outlays are relatively low, reflecting a lag time in starting up the program.

All outlays associated with S. 1214 assume enactment of the bill by January 1978 with regulations and appropriations completed by October 1, 1979.

7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Deborah Kalcevic.
10. Estimate approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The pertinent legislative reports and communications received by the committee from the Department of the Interior and the Department of Health, Education, and Welfare, setting forth Executive agency recommendations relating to S. 1214 are set forth below:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., October 28, 1977.

Hon. JAMES ABOUREZK,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request of October 7, 1977, for our views on the technical sufficiency of S. 1214, a bill to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

We are pleased to be of assistance to you in your request for technical advice for your marking-up of S. 1214. We are providing these technical comments in response to that request. You will understand, I am sure, that while we continue to believe that stability of Indian family life should be fostered through the preservation of their cul-

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tural identity, the provision of these comments does not change the Administration's position on this bill.

Subsection (c) of section 4 of S. 1214 contains a definition of the term "Indian tribe" which does not restrict the term to federally recognized Indian tribes. However, section 4(b), in the definition of the term "Indian", refers to "a federally recognized Indian tribe, so defined in subsection (c) hereof".

The term "Indian child" whihc is used throughout the bill, is not defined and it could be construed to mean any child of an "Indian", whether or not the child is eligible for enrollment in the tribe. Thus the bill could affect many children who are not now considered to be Indians. Subsection 4(d) defines "Indian organization" and appears thereby to include any Indian business within the definition of an Indian tribe set out in subsection 4(c).

Section 4(f) defines the term "nontribal public or private agency". This term includes "any court". Language should be added to exempt tribal courts.

Section 4(j) defines "extended family member" so as to include a variety of relatives. It is unclear whether the relatives therein described are relatives of the parent or of the child. The extended family member is not required to be an Indian to be eligible for preference in custody proceedings.

Section 101(b) requires clear and convincing evidence from "professional witnesses". This should be changed to "expert witnesses".

Section 101(e) of S. 1214 refers to "placement by any nontribal authority". It is not clear whether the parents of an Indian child are considered to be "nontribal authority". It doesn't appear to be the intent of the section to include them in that term but, on its face, the language is unclear.

Subsection 102(e) is somewhat ambiguous since a child's domicile is generally determined by the domicile of the father. We suggest the term "domicile" be substituted for "resident" and that the subsection be clarified to cover the situation where a child's parents live apart.

Subsection 102(f) is incorrect when it refers to preference standards set out in section 102, since the standards are set out in section 103.

In section 102(h) of S. 1214, regulation II of the Interstate Compact on the Placement of Children is cited. According to the version of the compact with which we are working, the cite should be to regulation III, not regulation II.

Section 102(j) of S. 1214 states that "the provisions of title IV of the act of April 11, 1968 (82 stat. 78) shall not apply to or limit the power of States and tribes to enter into such agreements or compacts". This language refers to agreements and compacts which provide for the transfer of jurisdiction between the States and the tribes. Section 404 of the act of April 11, 1968 (25 U.S.C. 1324 authorizes any State to assume criminal and civil jurisdiction over Indians even if the enabling act of the State prohibits such assumption. By stating that section 404 of the act of April 11, 1968 doesn't apply to the power of the States, section 102(j) will essentially disallow those States with enabling acts prohibiting assumption of Indian civil jurisdiction from entering into agreements or compacts in which any such jurisdiction would be assumed by a State.

With respect to title II of S. 1214, the possibility of a duplicity of programs exists between programs presently being carried out or authorized to be carried out by HEW, BIA, and HUD and programs authorized by section 201 of the bill. An example of this is the fact that BIA is presently involved in Indian home improvement, an aspect of the family development programs discussed in section 201 of S. 1214.

We appreciate the opportunity to express our views on the technical sufficiency of S. 1214. If you are in need of further assistance by this Department, please feel free to contact us.

Sincerely,

FORREST J. GERARD,
Assistant Secretary for Indian Affairs.

S. 1214—Indian Child Welfare Act (10/7 Revision) Suggested Technical Amendments.

1. Page 1, section 2. Delete "Reorganizing" and insert "Recognizing".

2. Page 4, section 4(a). On line 7, delete "Secretary of Interior" and insert "Secretary of the Interior".

3. Page 4, section 4(b), (c), (d) and (e). Delete lines 8 thru 25 and insert the following:

> (b) "Indian" means any person who is a member of, or who is eligible for membership in, an Indian tribe.
>
> (c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which is recognized as eligible for the special programs and services provided by the Bureau of Indian Affairs to Indians because of their status as Indians. The term includes each Alaska Native village listed in section 11(b)(1) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697).
>
> (d) "Indian organization" means any group, association, partnership, corportion, or other legal entity owned or controlled (including control by a majority of eligible votes) by Indians.
>
> (e) "Tribal court" means any court or administrative tribunal exercising jurisdiction over child welfare matters on behalf of an Indian tribe. The term includes any Court of Indian Offenses established by the Secretary.

4. Page 5, section 4(f). On line 3 delete "including any court," and insert "including any court other than a tribual court".

5. Page 5, section 4(g). On line 16 delete "term 'reservation' shall include" and insert "term includes".

6. Page 5, section 4(h). Delete lines 20 through 22 and insert—

> (h) 'Child placement' means any public or private action (whether voluntary or involuntary), including any judicial, quasi-judicial, or administrative proceeding, order, or action.

7. Pages 5 and 6, section 4(h). On page 5, lines 23, 24, and 25 and on page 6, line 3, respectively, delete "(a)", "(b)", "(c)", and "(d)" and insert "(1)", "(2)", "(3)", and "(4)".

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STATEMENT OF NANCY AMIDEI, DEPUTY ASSISTANT SECRETARY FOR LEGISLATION/WELFARE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Senator Abourezk, members of the committee, I am pleased to be able to be here this morning to testify on the subject of Indian child welfare, and your bill, S. 1214. We realize that your proposal does not directly involve HEW, and we appreciate your taking our views into account.

Your request for testimony from the Department of Health, Education, and Welfare, came at a particularly timely moment. As you no doubt know, the administration has recently undertaken a major review of foster care, adoptions, and other child welfare services, and just last week a bill reflecting the results of that review, S. 1928, was introduced by Senator Alan Cranston. Having your proposal before us, S. 1214, has prompted some soul-searching with respect to that proposal, and a new look at our own initiatives from the perspective of their value to Indian children in need of protective or other child welfare services.

In my statement this morning, I would like to deal with two things. First, for the committee's information, I would like to report on several of the Department's activities with relevance to services for Indian children, that were prompted in large part by hearings that this committee conducted in 1971 And then I should like to take up the subject of child welfare - particularly as it relates to S. 1214.

RECENT HEW ACTIVITIES RELATED TO INDIAN CHILD WELFARE SERVICES

Since the 1974 hearings, the Department has conducted and reported on the findings of, a state-of-the-field survey of Indian child welfare needs and service delivery. The survey examined the activities and policies of 21 States, and tried as well to review the training and employment opportunities for Indian professionals in child welfare.

In reporting on the policy implications of its findings, that survey pointed to several of the factors that remain of concern to members of this committee as well as others interested in the field:

> The need to support increased involvement by tribal governments and other Indian organizations in the planning and delivery of child welfare-related services;
>
> The need to encourage States to deliver services to Indians without discrimination and with respect for tribal culture;
>
> The need for trained Indian child welfare personnel;
>
> The need to resolve jurisdictional confusion on terms that will eliminate both the most serious gaps in service and the conflicts between State, Federal, and tribal governments that leave too many children without needed care;
>
> The need to find ways to insure adequate funding for services;
>
> The need to assure that insensitivity to tribal customs and cultures is not permitted to result in practices where the delivery of services weaken rather than strengthen Indian family life.

Negotiations are underway now with the National Tribal Chairman's Association for a project that would explore the desirability of amending the Social Security Act—to more effectively operate title XX social services programs for Indians. That project is being funded at more than a quarter of a million dollars, and is being conducted because we believe that further documentation of the need for services is of less importance at this point than the development of programmatic alternatives.

At the same time, we are reviewing proposals for a technical assistance contract designed to aid the governing bodies of recognized Indian groups in the development and implementation of tribal codes and court procedures with relevance for child abuse and neglect.

In the current fiscal year, the Secretary has exercised his authority to conduct research and demonstration projects on terms that will provide for a test of alternative methods to improve the ways in which state agencies deliver social services to Indians.

Similar efforts will focus specifically on the delivery of child welfare services in Public Law 280 states, the design of day care standards appropriate to Indian children living on reservations, and the designation of reservations as State planning areas for purposes of the title XX program.

All of these activities, including those that are still being put into operation, are intended to reflect the Department's belief that Indian child welfare services must be based not only on the best interests of the and support for the family unit—however that may be defined—but also on a recognition of the need to involve Indians themselves in the provision of services.

Child welfare initiatives

But individual projects, however sensitively designed cannot take the place of support for an adequately financed, officially backed, ongoing system to address the needs of children, and to support the rights of their families.

As the Secretary pointed out in announcing the Department's recent child welfare initiatives, none of those desirable features could be said to characterize the present situation in child welfare, for children of whatever race or ethnic group. Until now, the Federal Government has not done enough in the areas of foster care and adoption—providing minimal support for the efforts of individuals throughout the States who care about children, and who have been willing to fight the battles against out-moded and sometimes conflicting laws.

The situation across the country is not a pretty one. Too many children have been taken from their homes when supportive and preventive services might have allowed them to remain with their families. Those children who have been appropriately placed in others' homes, may be assigned to families too far away to make regular contact a possibility. Too little has been done to work with natural parents after a temporary placement in foster care—thus almost ensuring that the children will never be able to come home. For many children, the decision whether to return the children to their natural families, or, when appropriate, free them for adoption, is not made in a reasonable amount of time. Some children simply float in a kind of legal limbo because their foster parents cannot afford to lose the financial support that ends where legal adoption begins.

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We have learned that parents and children alike have suffered from the lack of adequate protection against the inappropriate removal of children from their homes, against the sometimes uninformed decisions that determine the placement outside their homes, and the nature of the judicial proceedings that may determine the fate of children who come into the orbit of the juvenile courts.

We have seen that there are too few trained workers available, too little guidance for over-worked staff, and even some perverse incentives that would seem to encourage social agencies to favor foster care over more permanent, more child-focused solutions.

It was for reasons such as these that the administration proposed two weeks ago to reorganize this Nation's system of child welfare services in ways that would provide more adequate funding and a better-integrated, more rational approach to the kinds of problems that have plagued the families of children in need of temporary or permanent care.

Everything we found in relation to child welfare services could be said about services for Indian children—and more. This committee has remarked on the higher-than-normal rate of foster care and other placement outside the home experienced by Indian children, the services that are provided in culturally insensitive ways, the placement of Indian children in settings that do not meet their special needs, the failure of public policies to recognize the unique character of many Indian families' lives.

Thus, while we recognize the concerns which have prompted you to propose a separate program exclusively devoted to the provision of Indian child welfare services, it is precisely because we also recognize the need for a better service system for all children that we would urge you to consider, together with us, how we might make that larger system serve their needs.

As I mentioned earlier in my remarks, your request for administration testimony was a timely one. It has caused us to consider whether the bill that we sent up to Congress, as drafted, would respond to the kinds of concerns that this committee, and S. 1214, have raised. You will perhaps not be surprised to learn that we found some gaps that had not been so apparent before. However, we now believe that we may be able to accomplish some of what you would want to see achieved.

We will want to be careful not to further duplicate either funding sources or administrative structures, but we think it may be possible to help Indian children through S. 1928.

The bill that we sent up to Congress would, for example:

State a clearer test for involuntary removal of children from their families;

Create financial incentives (in the form of extra child welfare funds) to:

Provide due process protections for child, birth parents, and foster parents;

Provide services that would enable children to remain home or to return home;

Call for a one-time review of all children in foster care for 6 months:

Create in each State an information system that will aid in case management and provide on-going oversight of children placed outside their homes;

Establish a new program of federally supported adoption subsidies to enable children with special needs to be adopted;

Create financial disincentives for the inappropriate use of foster care as a "holding action" for children.

Many of these provisions are not so very different from the provisions set out in S. 1214, particularly in title I, which speaks most directly to matters surrounding the procedures that have led in the past to the arbitrary and sometimes inappropriate removal of children from their homes. But we believe that in S. 1928 we have a suitable vehicle for serving the needs of Indian children as well as the needs of others.

We may have to make some changes in our proposal, but with changes, what we hope will be a more adequately funded, more comprehensive system of child welfare services will also be more responsive to the needs of Indian children.

I don't have any legislative language with me to propose this morning; we have not settled on any details. But we would like to work together with the staff of this committee and individuals whom you might recommend to try and meet some of your most serious concerns within the context of S. 1928. For example:

We share your objectives concerning the need for better safeguards and procedures to protect Indian children and their families. To provide those safeguards we might consider conforming language in the administration's bill that would take into account the role of tribal courts and tribal governments in the procedures that surround the placement of children outside their natural homes.

And, we are persuaded that the moneys available for child welfare services have in the past been uncertain, with gaps resulting from the Federal, State, and county systems. We believe we could rethink that as well so that, where appropriate, the new moneys that will become available under the administration's proposal would also become available for Indian children.

We intend to work closely with the BIA and the staff of this committee to determine what changes in S. 1928 might be needed to assure the full participation of, and safeguards for, Indians, under the administration's proposal.

With my testimony this morning, I am submitting a section-by-section analysis of the administration's child welfare proposals so that you can see the parallels where they occur.

I will, of course, be pleased to try and answer any questions that the committee may have.

Thank you.

SECTION-BY-SECTION SUMMARY

The first section of the draft bill would provide the short title of the Act—the "Child Welfare Amendments of 1977".

Section 2 of the draft bill would amend title IV of the Social Security Act by adding at the end of that title a new part which would authorize a program of Federal financial assistance to States for foster

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care and adoption assistance. Currently, State foster care programs are assisted with Federal funds available under the aid to families with dependent children (AFDC) program, and there is no Federal program designed specifically to help States encourage adoptions. Following is a summary of each section which would be contained in the new part E.

Section 470(a) of the part would provide the State plan requirements which must be satisfied for participation in the foster care and adoption assistance programs. Most of the provisions parallel requirements currently applicable to foster care programs under the State plan provisions for AFDC. They include requirements pertaining to "statewideness" (the programs must be in effect throughout the State), personnel standards based on merit, State reports to the Secretary, periodic evaluations of the programs, and confidentiality of individual records.

There are also several new provisions. They include the requirements (1) that the State agency which is responsible for the child welfare service program (authorized by title IV–B of the Social Security Act) and the social services program (authorized by title XX of the Social Security Act) also administer the new part E programs; (2) that the State will assure appropriate coordination between the new programs and other related programs; (3) that the State agency will bring to the attention of the appropriate court or law enforcement agency conditions which would endanger any child assisted under the part E programs; (4) that the title XX standards which apply to child-care institutions and foster care homes would also apply to such entities when assisted under part E; (5) that an individual denied benefits offered under the programs will be informed of the reason for the denial; and (6) that the State will arrange for periodic independent audits of its programs under part E.

Section 470(b) of that part would require the Secretary to approve a State plan which met the statutory conditions. In the case of a State which later fell out of compliance with the statutory requirements, the Secretary would have the flexibility to reduce the Federal payment to the State under part E by an appropriate amount, or cease making the payments entirely, until the State corrected its failure.

Section 471 of part E would describe the foster care maintenance program which a State must provide under its State plan. In many respects, the program would not differ from the one currently authorized as part of the AFDC program under section 408 of the Social Security Act. Following are the major innovations which would characterize the revised program: (1) Federal reimbursement would be provided with respect to children voluntarily placed in foster care or placed initially on an emergency basis; (2) findings to be included in judicial determinations which serve as the basis for placement in foster care would be specified; (3) the requirements for the individual case plan for each child in foster care would be strengthened; and (4) federal reimbursement would be permitted with respect to foster care provided by public institutions, so long as any such institution accommodated no more than 25 children. As under current law, children receiving foster care under part E would retain their Medicaid eligibility.

Section 472 of part E would describe the adoption assistance program which a State must provide under its State plan. Under the program, a State would be responsible for determining which children in the State in foster care would be eligible for adoption assistance because of special needs which have discouraged their adoption. The State would have to find that any such child would have been receiving AFDC but for the child's removal from the home of his relatives; that the child cannot or should not be returned to that home; and that, after making a reasonable effort consistent with the child's needs, the child was not adopted without the offering of financial assistance. In the case of any such child, the State would be able to offer adoption assistance to parents who adopt the child, so long as their income does not exceed 115 percent of the median income of a family of four in the State, adjusted to reflect family size.

The agency administering the program could make exceptions to the income limit where special circumstances in the family (as defined by regulation) warrant adoption assistance. The amount of the adoption assistance would be agreed upon between the parents and the agency, could not exceed foster care maintenance payment that would be paid if the child were in a foster family home, could be readjusted by agreement of the parents and the local agency to reflect any changed circumstances, and could initially include an additional payment to cover the non-recurring expenses associated with the adoption of the child. Adoption assistance payments would not be paid after the child reached maturity, or for any period when the family income rose above the specified limits. Finally, a child who the State determines has a medical condition, which contributed to the finding that he is a child with special needs, would retain his Medicaid eligibility until he reached maturity. It should be noted that, as is the case with other Medicaid recipients under current law, if there is a family insurance contract that covers the child, Medicaid would only provide coverage in excess of what is covered by the insurance policy. Furthermore, the Administration continues to favor the provision in H.R. 3 that would prohibit discrimination against insured medicaid recipients by their insurance providers.

Section 473(a) of part E would authorize appropriations for carrying out the programs authorized by part E. In the first two fiscal years of the program, 1978 and 1979, there would be authorized an appropriation of a sum necessary to pay each State the Federal share of whatever expenses are incurred in establishing and maintaining the part E programs.

During the five succeeding fiscal years, the authorization level would go up by ten percent each year, and beginning in fiscal year 1985 would be maintained at the fiscal year 1984 level.

Section 473(b) of part E would provide for the allotment to States of the funds appropriated. For the first two fiscal years of the program, there would be no limitation to the allotment—a State would be paid the Federal share of its expenditures under its State plan approved under part E. For the next five succeeding fiscal years a State would be entitled to an allotment each year which would be ten percent higher than the previous year's allotment. Beginning with fiscal year 1985, there would be no automatic annual increase in allotments.

Section 474 of part E would provide for payments to the States. For the first two fiscal years of the program, a State with an approved plan under part E would be paid the Federal share (as determined for purposes of the Medicaid program) of the cost of the program. For each fiscal year thereafter, the payment to a State would be limited by the amount of its allotment. Two other modifications would become effective beginning in fiscal year 1980—the Federal payment with respect to expenditures for child-care institutions which accommodate more than 25 children would be reduced to eighty percent of the payment as calculated in the first two fiscal years and sums allotted to a State for purposes of part E which the State does not claim under part E could bet claimed by the State under part B. As is currently the case under AFDC foster care, the Federal government would provide 75 percent reimbursement for training State employees to administer the plan, and 50 percent reimbursement for other administrative expenses.

Section 475 of part E would provide the definitions of certain terms used in part E or part B of title IV. Terms which are defined include "administrative review", "case plan", "voluntary placement agreement", "adoption assistance agreement", and "foster care maintenance payment".

Section 476 of part E would authorize an appropriation of $1.5 million annually to permit the Secretary to provide technical assistance to States to assist them in developing the programs called for in part E, to make grants to, or enter contracts with, the State agencies to develop interstate systems for the exchange of information pertaining to foster care and adoptions; and to evaluate the programs authorized under part B and part E of title IV. The Secretary, pursuant to this section, would publish periodically data pertaining to foster care and adoptions.

Section 477 of part E would limit the time period for the filing of claims for reimbursement by the Federal Government to two fiscal years following the fiscal year in which the expenditure was made.

Section 2 of the draft bill would also repeal section 408 of the Social Security Act, the provision of law which currently authorizes Federal reimbursement for State foster care programs.

Section 3 of the draft bill would amend part B of title IV of the Social Security Act—the part which authorizes Federal reimbursement for State child welfare services programs. The amendment would limit the amount of a State's payment under part B which the State could spend for foster care maintenance payments, adoption assistance payments, and employment related day care services to the amount which the State was actually paid under part B for expenditures in fiscal year 1977.

Section 4 of the draft bill would amend part B to convert the child welfare services program under that part to a State "entitlement" program, based upon the current annual appropriations authorization level of $266 million (but limited by certain conditions specified in section 6 of the draft bill). During this fiscal year, $56.5 million will be paid to the States pursuant to part B.

Section 5 of the draft bill would amend part B to modify the Federal share of State costs under the child welfare services program. Currently, the rate of federal reimbursement is related to the per

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capita income in each State, and generally ranges between about 40 percent and 60 percent. Under the amendment which would be made by section 5, Federal reimbursement would be 75 percent of expenditures for each State.

Section 6 of the draft bill would amend part B to specify the conditions under which States would be paid the additional sums, which would be authorized by the draft bill, beyond the amounts available for fiscal year 1977. Thirty percent of the additional sums would be available beginning in fiscal year 1978. States would be able to use that money for any purposes permitted under part B. However, the intent is to provide increased sums to the States to enable them to give priority to establishing certain systems and procedures—including information systems, case review systems, service programs to help children stay with, or return to, their families, and procedural safeguards to protect the rights of parents, children, and foster parents. States would also be expected to conduct a one time inventory of children in foster care.

Once these steps have been accomplished, but not before fiscal year 1979, a State would be eligible for the full amount of its allotment under part B, based on an appropriation of $266 million. A State eligible for its full payment would be required to meet two conditions: (1) an amount equal to at least 40 percent of the money it is paid in excess of the amount it received for fiscal year 1977 would need to be spent for services designed to help children stay with, or be returned to, their families, and (2) in any fiscal year, a State may not be paid in excess of the amount it was paid in fiscal year 1977 if the State spends less from State sources in that year for child welfare services than it spent from State sources in fiscal year 1977.

Section 7 of the draft bill would make two conforming changes to the State plan requirements for part B. It would require (1) that once a State had met the conditions for receipt of its full allotment under part B, the State would maintain the systems and procedures it had developed, and (2) that any requirements applicable to foster care maintenance payments or adoption assistance payments under part E would also be applicable to payments under part B which are used for those purposes. The purpose of the latter amendment is to assure that children in foster care, or who are adopted, with assistance under part B will be treated the same as children in foster care, or who are adopted, with assistance under part E.

Section 8 of the draft bill would repeal the reallotment provision currently in part B of title IV.

Section 9 of the draft bill contains some technical conforming changes. For example, whereas current law requires a State to have a foster care program under section 408 of the Social Security Act as a condition for participation in AFDC, under the draft bill the reference in the State plan for AFDC would be to foster care and adoption assistance payments in accordance with part E.

Section 9 of the draft bill would also require the Secretary to submit a report on the implementation of the amendments contained in the draft bill by March 1, 1980, and would provide an effective date for the draft bill of October 1, 1977. Finally, section 9 would provide that funds appropriated and allotted to States under part B for fiscal year

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1978 would remain available for expenditure by the States through fiscal year 1979.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of the rule XXIX of the standing Rules of the Senate, the committee notes that no changes in existing law are made by the bill S. 1214 as reported.

APPENDIX S. 1214 LEGISLATIVE REPORT

STATE OF NEBRASKA,
DEPARTMENT OF PUBLIC WELFARE,
October 25, 1977.

Ms. PATRICIA MARKS,
Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MS. MARKS: Senator James Abourezk requested that Nebraska Governor J. James Exon examine S. 1214 and submit any comments he might have. Governor Exon asked my department to review the bill and report to you. We find the philosophy and suggested system of placing Indian children with their Indian tribes to be very acceptable and exemplary. Our activities in child welfare indicate that a child is most responsive to remedial services if provided in the community and associated with normal family situations.

S. 1214 very clearly focuses the basic concept that Indian children should be cared for by Indian adults in an environment of the tribal culture. This concept is paramount to success.

We would like to stress two specific concerns which may be contained in the legislation.

1. It is essential that adequate training funds be provided to insure the development of resources in the Indian community and facilitate the transfer of the program from the state to the reservation. Without adequate training, this bill will fail.
2. It is important that the systems which are envisioned in S. 1214 would be supported by compatible philosophies and support systems currently provided by the Bureau of Indian Affairs. The Bureau and this welfare proposal must have a singular purpose of supporting the child in his community.

We appreciate the opportunity to review and comment on this legislation and look forward to the opportunity to assist in its implementation.

Sincerely,

ELDIN J. EHRLICH,
State Director.

STATE OF CALIFORNIA,
HEALTH AND WELFARE AGENCY,
Sacramento, Calif., October 21, 1977.

Hon. JAMES ABOUREZK,
Member of the U.S. Senate,
Select Committee on Indian Affairs, Washington, D.C.

DEAR SENATOR ABOUREZK: Governor Brown has received your letter of October 7, 1977.

We are in support of the legislation but wish to add the following for your consideration:

(1) Legal counsel should be provided to the child—independent of parents.

(2) Consent should be received from the child if over the age of, say, 12 years. If under 12, perhaps his or her opinion should be considered in the proceedings.

Thank you for the opportunity to offer comments.

Sincerely,

MARIO G. OBLEDO,
Secretary.

STATE OF OKLAHOMA,
OFFICE OF THE GOVERNOR,
Oklahoma City, October 21, 1977.

Mr. MICHAEL COX,
Minority Counsel, Select Committee on Indian Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. COX: At the request of Senator Dewey F. Bartlett, I have received a copy of S. 1214, the "Indian Child Welfare Act of 1977." I have reviewed the original and redrafted bill thoroughly. I believe this bill merits full endorsement. The guarantees provided in this bill merits full endorsement. The guarantees provided in S. 1214 for Indian children will contribute to maintaining the stability of Indian families. In addition, the bill recognizes the special "nonreservation" condition which exists in Oklahoma.

I commend the Select Committee on Indian Affairs for its work. If my office can assist you further, please contact Mrs. Gail Scott. I am pleased to lend my support to the passage of this important legislation.

Sincerely yours,

DAVID L. BOREN.

OCTOBER 26, 1977.

Mr. PETER TAYLOR,
Special Consul, Senate Select Committee on Indian Affairs, 5331 Dirksen Building, Washington, D.C.

DEAR MR. TAYLOR: The Indian Health Policy Panel is an advisory body to the California State Health Department. At a recent meeting the body went on record of supporting the Indian Child Welfare Bill, S.B. 1214.

California, like other States, had a long history of being unaware and unresponsive to the special needs of Indian children and families, in particular the placement and adoption of Indian children. There are no rules or guidelines in effect for the policy of attempting to place Indian children with Indian families.

The entire area of social services to Indians in California is in need of scrutiny and upgrading. There should be an Indian Division in the Department of Social Welfare to accommodate the special needs of Indians, in particular those in rural areas, on reservations and on rancherias.

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The adoption of a federal bill such as Senator Abourezk's Bill S.B. 1214 on the entire protection of Indian children and families rights, will greatly assist in bringing about a response and action plan at the State level.

Sincerely,

H. D. TIMM WILLIAMS,
Chairperson, Indian Health Policy Panel.

OFFICE OF THE GOVERNOR,
Phoenix, Ariz., October 28, 1977.

Hon. JAMES ABOUREZK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ABOUREZK: The Governor's office has reviewed the reference bill and offers the following comments for your consideration:

There is some concern regarding the provisions in section 101(c) allowing that the child's parent may withdraw voluntary consent to adoption "for any reason at any time before the final decree of adoption." This injects a new and significant risk in placing Indian children for adoption, and will limit the opportunity for a stable secure family for some children.

We are pleased that title II, section 204(a) has been deleted, we could not have supported the provisions for review and possible reversal of placements over the past 16 years.

Clarification is needed either in the bill or in guidelines, regarding relationships between State and tribal court systems, and establishing the child's tribal identity if there are ties to several tribes, and also significant ties to the Anglo community through an Anglo parent and the related rights of the Anglo parent.

The provision in section 104, ensuring the child's right to know his birth identity at age 18, is of interest, and could become a catalyst for legislation specifying rights of all adult adoptees.

Thank you for the opportunity to comment on this bill.

Sincerely,

ROBERT HATHAWAY,
Special Assistant.

DEPARTMENT OF HUMAN RESOURCES,
CHILDREN'S SERVICES DIVISION,
Salem, Oreg., October 18, 1977.

Senator MARK O. HATFIELD,
U.S. Senate, Select Committee on Indian Affairs,
Washington, D.C.

DEAR MARK: Thank you very much for sending me a copy of the Indian child welfare bill which is being reviewed by the Senate Select Committee on Indian Affairs. As you are well aware, Oregon is one of the States in the Nation which has an Indian population both on reservations and absorbed into our general State population.

I am pleased that the thrust of this piece of legislation is to promote the stability and security of the Indian family. The bill is in concert

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with other social legislation which is aimed at preventing placements in long term foster care, and maintaining children in their own homes where services can be provided in the least restrictive environment.

I believe it is imperative that we begin working with families in crisis, not by removing children and treating them in isolation, but by dealing with the total family to insure that the family unit can be maintained and that a child will not have to face the trauma of being removed from his own home. This bill provides that the child's parents be involved and that any placement of the child will be only after the family has been tried as a treatment resource and is found incapable of meeting the needs of the child. I am further pleased that this piece of legislation will clarify the role of state, public and private agencies when dealing with children who reside on an Indian reservation.

Questions or comments on specific provisions of the bill are as follows:

1. Section 4(b)—Definitions

It is the intent of this bill to provide recognition, protection and privileges to only those who can be affiliated with a tribe? If this is the case, adoptive homes of Indian heritage for Indian children would be more limited than they already are. BIA has advised that a home where one parent is one-fourth or more Indian descent is Indian and, even so, these homes are hard to find. If I read it right, the strict definition will make location of Indian homes more difficult.

2. Section 101(c)

Section 101(c) attempts to provide protections when parents voluntarily consent to placement by signing before a judge and providing the consent be explained. This is good and provides protections which would be good for all parents.

Administration of this might be difficult, as all state laws do not provide for such a system. Oregon does not. The provision that consents for adoption may be withdrawn any time prior to legal adoption is contrary to Oregon law which provided that no surrender for the purpose of adoption to an adoption agency can be revoked once the child is placed in an adoptive home. The provision for setting aside an adoption decree is also contrary to Oregon law, which provided that no adoption decree shall be questioned for any reason after expiration of one year from entry of the decree.

3. Section 103 (a)

Section 103 (a) that provides the order in which adoptive homes are to be considered for children has some merit by assuring more effort to find Indian homes for Indian children. I question the order, as it appears the requirement would be to evaluate first extended family then a home on the reservation, tribal members and finally a home approved by the tribe.

By having to go in order, time delays are possible, which can deny a child permanence. The goal should be to seek the best possible home regardless of order. I would suggest the words "in following order" be removed and add instead, "these kinds of homes should be evaluated."

I am pleased to find that the major thrust of this bill is in line with child welfare reform which is being proposed for all children, and that its strengths lie in its increased efforts to maintain children in their own home. I would be pleased if you would keep me informed of this bill as it progresses through legislative steps.

Sincerely,

(For J. N. Peet, Administrator).

REGULATION II

1. Programs of public or private agencies in which children are placed in family homes as an incident to their attendance at schools in communities in other States are foster care placements within the meaning of the compact. They do not fall within the educational exception resulting from the definition of placement in article II(d) of the compact. The home rather than the educational institution provides child care and supervision during the time when the child is not in attendance at the school program.

2. To facilitate the conduct of such a program, the agency administering it may investigate or make arrangements for such investigations and prepare reports on homes in advance and may offer such reports to compact administrator as part of the information supplied in connection with an intended placement, provided that any such report is current to within 6 months of the date of its submission in connection with an intended placement.

3. Any home in which a child is placed or proposed to be placed pursuant to this regulation shall obtain and maintain such license or approval as a child care or foster home as the laws and implementing regulations of the receiving State may require. The license or approval shall be in full force and effect at the time when the sending agency gives notice of the intended placement and at all times during the continuance of the placement. Failure to meet this condition shall be sufficient ground for denial of an affirmative notice pursuant to article III(d) of the compact.

4. The operator of a program which uses family homes to provide board and lodging, child care and supervision or foster care in order to facilitate the securing of education by children in communities other than their own may consolidate notifications of intended placements provided that all of the information reasonably required pursuant to article III of the compact is contained in or accompanies the consolidated submission. The information and documents shall include:

(a) Name of child, together with age, sex and such other basic identifying information as may be appropriate.

(b) Name of parents, responsible relative or guardian and address.

(c) Identification by name and address of family home in which the child is intended to be placed, together with a copy of the child caring or foster care license or approval, if any is required pursuant to the laws of the receiving state.

(d) A statement that the sending agency is familiar with the conditions in the home and with the family members and that, on the basis of such familiarity, has determined that having the child there for the school year does not appear to be contrary to the best interests of the child.

(e) A statement from the sending agency that it undertakes to return any child to its parents or guardian or to make an alternative arrangement for the child whenever and if the then current arrangement becomes inadequate or when the parent or guardian requests return.

(f) A copy of the agreement between the parent or guardian and the sending agency pursuant to which the child is received into and maintained in the program.

(g) A statement of the sending agency detailing the manner in which the regular and any special or extraordinary medical care needs of the child will be met.

(h) Such supporting or additional information as may be requested pursuant to article III(c) of the compact.

5. The operator of a program to which this regulation applies shall:

(a) Notify the compact Administrator of the receiving state promptly if the child is returned to his parental or guardian home or sent to another home during the school year as part of an arrangement to facilitate continuance in the program.

(b) Notify the compact Administrator of the receiving State promptly upon the child's return to his parental or guardian home at end of the school year.

(c) Send promptly to the compact administrator of the State from which the child was placed a copy of any notice sent pursuant to subparagraphs (a) or (b) hereof, if the laws or regulations of that State so require.

6. If a child in the program is replaced from one home to another the action shall be considered a new placement and shall require the same notifications, furnishing of information and documentation, and receipt of a notice pursuant to article III(d) of the compact as an initial placement.

7. The special procedures of this regulation shall be available only for programs in which the parents or guardian retain full custodial rights to affect by the giving or withholding of consent or otherwise, the place of abode and participation in the program of the child. Further, this regulation applies only to programs a purpose of which is to afford children educational opportunities but in which residential schools or other residential institutions are not utilized to provide the educational program.

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[COMMITTEE PRINT]

AMERICAN INDIAN POLICY REVIEW COMMISSION

FINAL REPORT

SUBMITTED TO CONGRESS
MAY 17, 1977

VOLUME ONE OF TWO VOLUMES

Printed for the use of the
American Indian Policy Review Commission

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1977

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> tion of welfare assistance; but instead, the BIA uses it to declare all Indians in certain geographic areas ineligible for BIA General Assistance. The BIA relies on this rule, as well as on other factors, in deciding whether or not to operate its general assistance program in a specific location. For example, since Arizona and its counties refuse general assistance to Indians living on a reservation, the BIA operates its general assistance program on Arizona reservations, but since Utah permits eligible Indians on reservations to receive State general assistance, the BIA has no general assistance program in that state.[112]

These authors point out, this policy discriminates against reservation Indians living in States with general assistance programs which include Indians. State programs are generally less beneficial than the BIA program. Moreover, inclusion in State programs precludes Indian recipients from benefits under the BIA program.

According to Barlow and Blue, "although the exclusion of reservation Indians from State (or local) general assistance poses constitutional problems, raising these issues would only harm Indians, because virtually all State and local general assistance programs provide less money to recipients and are more restrictive in their coverage than BIA general assistance."[113]

BIA has ignored the reality of welfare "benefits" by its refusal to supplement State categorical welfare when such benefits do not meet 100 percent of BIA established needs.[114] To say that participation in any program, no matter how inadequate, supplants the goal of the higher standards established by BIA, subverts the clear intent of the Snyder Act.

CHILD PLACEMENT

The policy of removing Indian children from their homes and tribal settings to "civilize" them began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by non-Indian families and their placement in non-Indian foster care homes and institutions.

Two basic jurisdictional questions exist: who decides whether an Indian child needs to be removed from home; and where and how that child is to be raised. Until very recently, such decisions have been made by non-Indians without tribal input. Today, the tribes are beginning to reassert their historical role in the care and protection of Indian children.

While both Indians and non-Indians are concerned with child placement, social workers without training or understanding of Indian lifestyle or culture are ill-equipped to make judgments about the adequacy of the Indian child's upbringing. Even if one assumes the social worker is making the right decision, there should be an effort to maintain the family unit while problems are being solved.

RECOMMENDATIONS

The Commission recommends that:

Congress hold oversight hearings to clarify the division of responsibility between Federal and State agencies involved with Indian affairs: including BIA, HEW, IHS, Office of Civil Rights, and Social and Rehabilitation Services; and direct these agencies to consult with State agencies to determine the causes of the breakdown in the delivery of services to Indians by the States.

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[112] 51 N. Dak. L. Rev. 31 at 41–42.
[113] *Id.*
[114] 66 I.A.M. 3.1.4(B).

The BIA and HEW promulgate regulations to clarify that Indian trust money and land is not to be considered an asset by State and county governments in determining eligibility for welfare programs.

BIA be required to publish in the Federal Register and in the Code of Federal Regulations their procedures and guidelines for general assistance under the Snyder Act.

Procedures and practices used in the BIA's 64 local welfare offices should be standardized and made uniform, ending the practice of discretionary action on the part of the local BIA caseworkers.

Receipt of State or local general assistance should not make an Indian ineligible for BIA assistance when supplemental aid is needed.

CHILD PLACEMENT

The Commission recommends that:

Congress, by comprehensive legislation, directly address the problems of Indian child placement and the legislation adhere to the following principles:

a. The issue of custody of an Indian child domiciled on a reservation is the subject of the exclusive jurisdiction of the tribal court where such exists.

b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child be given reasonable notice before any action affecting his/her custody is taken.

c. The tribe of origin have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff;

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant Federal financial resources should be appropriated for the enhancement or development, and maintenance of mechanisms to handle child custody issues, including but not limited to Indian operated foster care homes and institutions. In reservation areas such resources should be made directly available to the tribe.

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REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION

TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION

FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION

SHERWIN BROADHEAD, *Chairman*
JUDGE WILLIAM ROY RHODES, *Pima*
MATTHEW CALAC, *Rincon*
PAUL ALEXANDER, *Special Counsel*
DONALD R. WHARTON, *Specialist*

Printed for the use of the American Indian Policy Review Commission

U.S. GOVERNMENT PRINTING OFFICE
77-487 WASHINGTON : 1976

the building of a dam, there should be provision which will contemplate such impact. Ad hoc compensation is simply not appropriate or sufficient where such impact may totally wipe out an economic base or cultural structure when prior review could obviate such a result. Provisions for review such as are found in section 102(C) of the National Environmental Policy Act [43 U.S.C. 4332] would require investigation and research into possible infringements with notice and opportunity to the potentially affected tribe for input.

As a corollary to the above provisions, enactments by the various States which directly or indirectly impact on the exercise of Indian rights should be subjected to similar review provisions. Such enactments by States are forbidden when they interfere with Indian rights. Emergency provision should be made for those situations which present exigent circumstances with additional provision for speedy review.

(d) In recognition of the significant impact which international considerations have on Indian rights, specific provision should be made for Indian representation on such bodies; for example, International Pacific Salmon Fisheries Commission and the National Marine Fisheries Services of the United States.

Of significant importance is congressional cognizance and recognition of the importance of equal participation by Indian tribes in implementing plans for enforcement, management, and enhancement of fisheries. It is appropriate and consistent with Indian needs and their relative role in this area that they be an integral part of the management and enforcement implementation. Congressional action should so reflect.

B. CHILD CUSTODY

> * * * I can remember [the welfare worker] coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done * * *[1]

It is still being done, but now it is being aggressively questioned and fought, and hopefully in some places, the frequency of removing Indian children from their homes to non-Indian adoptive or foster care homes has lessened.

The issue is a crucial one in Indian country, and its ramifications are many. Removal of Indians from Indian society has serious long- and short-term effects, both for the tribe and for the individual child removed from his/her home environment who may suffer untold social and psychological consequences. Louis La Rose, chairman of the Winnebago Tribe, expressed the anger of many when commenting on the debacle of the Indian child placement situation:

> I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him. And if you have ever talked to an individual like that when he comes to a reservation . . . I get depressed.[2]

One of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the

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[1] Testimony of Valencia Thacker, southern California transcript at 33.

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way to destroy Indian tribal integrity and culture, usually justified as "civilizing Indians," is to remove Indian children from their homes and tribal settings. This effort began in earnest in the 1880's when Indian children were removed from their homes and sent to distant boarding schools. The Indian people fought this removal with whatever means were at their disposal. It is not necessary here to recount the horror stories, reams of which are well documented—suffice to say that the resultant mortalities were incredible and the brutality against Indian students belies any notion of civilization. Many current tribal leaders still bitterly remember their own experiences. Peter MacDonald, Chairman of the Navajo Nation, related tales of corporal punishment administered for speaking Navajo in school.[3] Although boarding schools still are in existence and still present major problems, many of the more perverse practices, fortunately, appear to have receded.

Current issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions. It is a curious paradox that many early, non-Indian commentators, observing Indian culture, praised familial and tribal devotion to their children, yet now, after generations of contact and conflict with Western civilization, so many Indian families are perceived as or found to be incapable of child rearing. The practices of assimilation and removal have had their impact.

The jurisdictional questions are fairly simple: who decides whether an Indian child needs to be removed from his or her home, and who decides where and how that child is to be raised? In America today, these decisions are made by a combination of public and private social service agencies and court systems. The question further refined becomes: Do tribal authorities make these decisions for dependent Indian children, or do non-Indian authorities make these decisions? In this century, most decisions have been made by non-Indian authorities. The pattern, however, is beginning to shift, as tribes, through their court systems, and developing tribal social service agencies, reassert their historical role in the care and protection of Indian children.

One might ask, since both Indian and non-Indian systems should act in the best interests of the child, what difference it makes which court has jurisdiction. The difference is that these decisions are inherently biased by the cultural setting of the decisionmaker and the history as to what has happened to Indian children when decisions are made by non-Indian authorities. Several years ago, it was estimated on the best available data that 25 to 35 percent of all Indian children are being raised by non-Indians in homes and institutions.[4]

An Indian family's initial contact with these non-Indian institutions is usually the "welfare worker." Given the destitute and impoverished conditions extant on many reservations and in the urban areas to which Indians were relocated, public assistance is a painful but necessary reality. The social workers, who are usually untrained[5] and have little or no understanding of Indian lifestyle or culture, make judgments concerning the adequacy of the Indian child's upbringing.

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[3] Transcript of hearings before the U.S. Commission on Civil Rights, Window Rock, Ariz., Oct. 22–24, 1973, at 18.

[4] Indian Family Defense, Winter, 1974.

[5] Untrained is defined as lacking an M.S.W. Unfortunately, most M.S.W. programs do not [illegible] train [illegible] with respect to Indians.

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Even assuming that the judgment is correct and that the welfare worker has not imposed inapplicable social-cultural values, if the judgment is negative, then the social worker should attempt to provide counsel to the family. The effort should be made to maintain an intact family unit while problems are being resolved. Unfortunately, given cultural barriers, this effort is often not possible.

The next step is frequently termination of parental rights. Economically dependent parents are often urged to consent to the removal of their child. The termination of parental rights is done through a court proceeding. Once parental rights are terminated, the court, again relying on the poorly trained, often biased or judgmental social worker, then decides the question of the custody [placement] of the child. If custody is given to public or private social service agencies, they then decide the actual placement of the child. In adoption proceedings, the court will rule on the actual adoptive family.

Within these systems, two levels of abuse can and do occur. In the initial determination of parental neglect[6] the conceptual basis for removing a child from the custody of his/her parents is widely discretionary and the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family. Second, assuming that there is a real need to remove the child from its natural parents, children are all too frequently placed in non-Indian homes, thereby depriving the child of his or her tribal and cultural heritage. Non-Indian institutions apparently have a very difficult time finding Indian foster homes and adoptive parents. In recent years, some States are making concentrated efforts to improve;[7] however, many of the home approval criteria are rigid and inappropriate for the economy and lifestyle of many Indian families. Because of this, many fine potential Indian adoptive and foster care families are rejected or, fearing rejection, do not apply. This process can eliminate blood relatives of the child.

Unless a tribe is actively involved with child welfare issues through its court system and its social service agencies, it has almost no way of knowing what is occurring with respect to its minor tribal members.[8] Even where a tribe is actively involved with these issues, there are substantial difficulties, particularly when events occur outside of its territorial jurisdiction. There is no existing requirement that public or private social service agencies, whether they are close by or in distant cities, have to notify a tribe when they take action with respect to any tribal member.[9] Even when a tribe seeks to aggressively assert its interests in child custody proceedings in non-Indian forums, it cannot do so as a matter of right.[10]

A particular problem also exists where the child is entitled to moneys based on tribal membership—either on a yearly per capita basis or otherwise—and the tribe is required to turn these moneys over to agencies and placement families.

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[6] Few Indian children are brought to court based on "abuse".

[7] Testimony of Gerald Thomas, Director of Social Services, Washington State, Northwest transcript at 499.

[8] Because of the lack of any systematic and comprehensive recordkeeping, even the non-Indian agencies which are removing Indian children on a daily basis do not know the full dimensions of the problem. Several State social service agency officials who were contacted as part of the data collection process (presented in the following section) expressed surprise at the statistics they gathered.

[9] Although the Washington State social service agency stated that it was their practice to notify tribal officials whenever it took any action involving tribal members, this policy is, however, not codified. Northwest transcript at 501. Tribal frustration with the general pattern of nonnotice is reflected by a Gila River ordinance which makes it a criminal offense to remove an Indian child from the reservation without the consent of the tribal court.

[10] [illegible] (1975).

1. THE DEMOGRAPHY OF THE PROBLEM [11]

Because of the various recordkeeping systems of States and counties, it is difficult to obtain a picture of the full dimensions of this problem. Data is often grossly incomplete, omitting crucial information such as whether placements are made to Indian or non-Indian homes. Information is often not available on all the factors which affect the placement issue, such as private agencies.

The data in this section has been calculated on the most conservative basis possible; the figures presented therefore reflect the most minimal statement of the problem. Adoption statistics are calculated by using the child's age at adoption and projecting pattern based on available yearly placement patterns. Foster care figures are derived from the most recent yearly statistics available. All statistics are from 1973–1976 unless otherwise indicated.

Statistics are presented for those States where a significant Indian population resides.

Alaska

There are 28,334 Alaskan Natives under 21. Of these, 957 (or 1 out of every 29.6) Alaskan Native children has been adopted; 93 percent of these were adopted by non-Native families. The adoption rate for non-Native children is 1 out of 134.7. By proportion, there are 4.6 times (460 percent) as many Native children in adoptive homes as there are non-Native children.

There are 393 (or 1 out of every 72) Alaskan Native children in foster care. The foster care rate for non-Natives is 1 out of every 219. There are, therefore, by proportion, 3 times (300 percent) as many Native children in foster care as non-Native children. No data was available on how many children are placed in non-Native homes or institutions.

Arizona

There are 54,709 Indian children under 21 in Arizona. Of these, 1,039 (or 1 out of every 52.7) Indian children has been adopted. The adoption rate for non-Indian children is 1 out of every 221.4. There are therefore, by proportion, 4.2 times (420 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 558 (or 1 out of every 98) Indian children in foster care.[11a] The foster care rate for non-Indians is 1 out of every 263.6. There are therefore, by proportion, 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children.

California

There are 39,579 Indian children under 21 in California. Of these, 1,507 (or 1 out of every 26.3) Indian children has been adopted: 92.5 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 219.8. There are therefore, by proportion, 8.4 times (840 percent) as many Indian children in adoptive homes as there are non-Indian children.

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[11] Much of this section is based on Indian Child Welfare Statistical Survey, July 1976, prepared for the Task Force by the Association on American Indian Affairs, Inc.; all data unless otherwise indicated is from this survey.

[11a] Absolute minimal estimate.

There are 319 (or 1 out of every 124) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 366.6. There are therefore by proportion 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

Idaho

There are 3,808 Indian children under 21 in Idaho. The figures on adoptions are too small to be statistically significant.

There are 296 (or 1 out of every 12.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 82.7. There are therefore by proportion, 6.4 times (640 percent) as many Indian children in foster care as there are non-Indian children.

Maine

There are 1,084 Indian children under 21 in Maine. Of these, 0.4% were placed for adoption during 1974–75.

There are 82 (or 1 out of every 13,2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 251.9. There are therefore by proportion, 19.1 times (1,910 percent) as many Indian children in foster care as there are non-Indian children; 64 percent of the Indian children are in non-Indian foster care homes.

Michigan

There are 7,404 Indian children under 21 in Michigan. Of these, 912 (or 1 out of every 8.1) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 30.3. There are therefore by proportion, 3.7 times (370 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 82 (or 1 out of every 90) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 641. There are therefore by proportion, 7.1 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Minnesota

There are 12,672 Indian children under 21 in Minnesota. Of these, 1,594 (or 1 out of every 7.9) Indian children has been adopted; 97.5 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 31.1. There are therefore by proportion, 3.9 times (390 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 737 (or 1 out of every 17.2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 283.8. There are therefore by proportion, 16.5 times (1,650 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

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Montana

There are 15,124 Indian children under 21 in Montana. Of these, 541 (or 1 out of every 30) Indian children has been adopted; 87 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 144.6. There are therefore by proportion, 4.8 times (480 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 534 (or 1 out of every 28.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 363.5. There are therefore by proportion, 12.8 times (1,280 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

Nevada

There are 3,739 Indian children under 21 in Nevada. The figures on adoptions are too small to be statistically significant.

There are 79 (or 1 out of every 47.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 333.8. There are therefore by proportion, 7.0 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

New Mexico

There are 41,315 Indian children under 21 in New Mexico. The figures on adoptions are too small to be statistically significant.

There are 287 (or 1 out of every 147) Indian children in foster care. The rate for non-Indians is 1 out of every 343. There are therefore by proportion, 2.4 (240 percent) as many Indian children in foster care as there are non-Indian children. No data is available on how many Indian children are placed in non-Indian homes and institutions.

New York

There are 10,627 Indian children under 21 in New York. The figures on adoptions are too small to be statistically significant.

There are 142 (or 1 out of every 74.8) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 222.6. There are therefore by proportion. 3 times (300 percent) as many Indian children in foster care as there are non-Indian children. An estimated 96.5 percent are placed in non-Indian foster homes.

North Dakota

There are 8,126 Indian children under 21 in North Dakota. Of these, 269 (or 1 out of every 30.4) Indian children has been adopted. Seventy-five percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 86.2. There are therefore by proportion, 2.8 times (280 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 296 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 553.8. There are therefore by proportion. 20.1 times (2,010 percent) as many Indian children in foster care as there are non-Indian children. No data was

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available on how many Indian children are placed in non-Indian homes and institutions.

Oregon

There are 6,839 Indian children under 21 in Oregon. Of these 402 (or 1 out of every 17) Indian children has been adopted. No data was available on adoptions by non-Indian families. The adoption rate for non-Indian children is 1 out of every 19.2. There are therefore by proportion, 1.1 times (110 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 247 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 228.5. There are therefore by proportion, 8.2 times (820 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Oklahoma

There are 45,511 Indian children under 21 in Oklahoma. Of these, 1,116 (or 1 out of every 40.8) Indian children has been adopted. No data was available on adoption by non-Indians. The adoption rate for non-Indian children is 1 out of every 188.1 There are therefore by proportion 4.4 times (460 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 337 (or 1 out of every 135) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 551. There are therefore by proportion 3.9 times (410 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

South Dakota

There are 18,322 Indian children under 21 in South Dakota. Of these, 1,019 (or 1 out of every 18) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 32.4. There are therefore by proportion, 1.6 times (180 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 832 (or 1 out of every 22) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 492.1. There are therefore by proportion 22.4 times (2,040 percent) as many Indian children in foster care as there are non-Indians. No data was available on how many Indian children are placed in non-Indian homes.

Washington

There are 15,980 Indian children under 21 in Washington. Of these, 740 (or 1 out of every 21.6) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 407. There are therefore by proportion, 18.8 times (1,900 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 559, or 1 out of every 28.9 Indian children in foster care. The foster care rate for non-Indians is 1 out of every 275. There are therefore by proportion, 9.6 times (960 percent) as many Indian children in foster care as there are non-Indian children. Eighty percent of these were placed in non-Indian homes.[14]

Wisconsin

There are 10,456 Indian children under 21 in Wisconsin. Of these, 733 (or 1 out of every 14.3) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 251.5. There are therefore by proportion, 17.9 times (1,760 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 545 (or 1 out of every 19) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 252. There are therefore by proportion, 13.4 times (1,330 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Wyoming

There are 2,832 Indian children under 21 in Wyoming. The figures on adoptions are too small to be statistically significant.

There are 98 (or 1 out of every 28.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 301.6 There are therefore by proportion, 10.4 times (1,040 percent) as many Indian children in foster care as there are non-Indian children. Fifty-seven percent of the Indian children in State foster care are in non-Indian homes; and 51 percent of the children in BIA foster care are in non-Indian homes.

Utah

There are 6,690 Indian children under 21 in Utah. Of these, 328, (or 1 out of every 20.4) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 68.5. There are therefore by proportion 3.4 times (340 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 249 (or 1 out of every 26.4) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 402.9. There are therefore by proportion, 15 times (1,500 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

2. LEGAL STATUS—WHO DECIDES?

The Federal courts, as well as some State courts, have generally recognized the crucial place which the issue of child custody holds in the framework of tribal self-determination.

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right within its own boundaries and membership to provide for its young, a *sine qua non* to the preservation of its identity.[15]

The most recent Supreme Court case on the subject, *Fisher* v. *District Court*,[16] affirmed the jurisdiction of the Northern Cheyenne

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[14] Northwest transcript, exhibit 14.

[15] *Wisconsin Potawatomies of Hannahville Indian Community* v. *Houston*, 393 F. Supp.

Tribal Court to make custody determinations in the face of a challenge to have such jurisdiction taken by Montana State courts. Since Montana had not acquired any jurisdiction over Indian country pursuant to Public Law 280, and the action arose on the reservation, the Supreme Court characterized the tribal court's jurisdiction as exclusive.

Many Indian child placement issues do not necessarily arise in such clean-cut fashion. Frequently, the physical location of the child affects whether the tribal court has jurisdiction. *Decoteau* v. *The District Court*,[15] is a case involving a conflict between State and tribal jurisdiction, where the pertinent acts occurred on both trust land and non-trust land. The Supreme Court upheld State jurisdiction based on a finding that the non-trust portion of the "former" reservation had been terminated. In that case, the tribal interest in the welfare of its minor member, however, cannot be as a practical matter any less than where geography assures jurisdiction.

Although *Decoteau* did not deal with the issue of "domicile," it is pertinent to child welfare jurisdiction. "Domicile" is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities. The domicile of a child is often viewed as a basis for a court's jurisdiction to determine his/her custody. In these situations where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction. In a recent New Mexico case involving a Navaho child situated off reservation in Gallup, N. Mex., it was argued that the Navajo tribal court is the appropriate forum to determine custody.[16]

> Child rearing and the maintenance of tribal identity are "essential tribal relations" [citation omitted]. By paralyzing the ability of the tribe to perpetuate itself, the intrusion of a State in family relationships within the Navaho Nation and interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy."

This concept of court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child and recognizes that the tribal relationship is one of *parens patriae* to all its minor tribal members. It is an attractive formulation, considering that in reality, Indian children are usually culturally and tribally terminated by placements to non-Indian homes when they are subject to State court systems.[18] This has not been given substantial recognition by the courts.[19] As a practical matter, this construction seems limited to situations where the Indian child is in reasonable proximity to the tribal court, such as in a border town. Applying this construction to an Indian child living in Chicago who is an enrolled member of the Yakima Nation would create major practical difficulties without a well-defined operating system for effectuating tribal jurisdiction.

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[15] 420 U.S. 425 (1975).

[16] See e.g., *Wisconsin Potawatomies of the Hannahville Indian Community* v. *Houston*, supra; and *Shaving Bear* v. *Pearson*, et al., S.D. Cir. Ct., 6th Jurisdiction Cir. June 21, 1974 (unreported).

[17] In the matter of the Adoption of Randall Nathan Swanson, Amicus Curae Brief, No. 3497.

[18] Ibid at 5.

[19] [illegible]

Just as mobility will frequently remove Indian children from reservation systems and bring them into initial contact with non-Indian systems, so mobility will also remove a child subject to a tribal court's jurisdiction into another geographic jurisdiction. This can create the following problem: After a tribal court determines child custody, the child leaves the reservation, and the issue of custody is relitigated in a non-Indian court. Generally, between the States, the constitutional standard of "full faith and credit" governs the way one court will treat the decisions of another. This standard is not constitutionally required of State courts with respect to the judgments of tribal courts. State courts can (and some do)—under the principle of comity—respect between sovereigns—recognize the determinations of tribal courts. Recently the Maryland Court of Appeals refused to allow Maryland courts to determine the custody of a Crow child where that determination had been made by the Crow Tribal Court.[20]

FINDINGS

1. The removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis.
2. Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.
3. Non-Indian public and private agencies, with some exceptions, show almost no sensitivity to Indian culture and society.
4. Recent litigation in attempting to cure the problem of the removal of Indian children, although valuable, cannot affect a total solution.
5. The current systems of data collection concerning the removal and placement of Indian children are woefully inadequate and "hide" the full dimension of the problems.
6. The U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children.
7. The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.

RECOMMENDATIONS

1. Congress should, by comprehensive legislation, directly address the problems of Indian child placement. The legislation should adhere to the following principles:

a. The issue of custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists.

b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken.

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[20] Wakefield v. Little Light, 276 Md. 333, 347 A 2d 228 (1975).

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c. The tribe of origin shall have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, shall have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff;

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant Federal financial resources should be appropriated for development and maintenance of Indian operated foster care homes and institutions:

(i) in reservation areas such resources should be made directly available to the tribe;

(ii) in off-reservation areas, such resources should be available to appropriate local Indian organizations.

f. The Secretary of the Interior should be authorized to:

(i) undertake a detailed study of the manner and form of child placement records;

(ii) to definitely determine the full statistical picture of child placement as it currently exists;

(iii) to require standardized child placement recordkeeping systems from all agencies receiving Federal moneys;

(iv) to require annual reports from such agencies pursuant to the mandatory recordkeeping system;

(v) to review all rules and regulations of the Federal Government with respect to child placement, and revise such, in consultation with Indian tribes and child placement agencies to reflect Federal policy of retaining Indian children in Indian homes.

C. JURISDICTION OVER NON-INDIANS

This area must be approached on several levels. There is widespread apprehension in the non-Indian community residing on or near Indian reservations concerning the exercise or potential exercise of tribal jurisdiction over non-Indians. This feeling appears to be, at least in part, based on a major nonunderstanding in the non-Indian community about the legal status of Indian tribes and their historical-constitutional relationship with the Federal Government. Complicating this vacuum of knowledge is an implicit, and sometimes explicit, viewpoint that while it might be permissible for Indian tribes to have power over Indians, it is somehow morally inappropriate to have such power over non-Indians within their territories. In this furor over the exercise of power, Indian governments are, in the political arena, being held to higher standards of performance than Americans generally expect from their public institutions—it is as if competence of non-Indian governments is assumed and that of Indian governments must be demonstrated.

AMERICAN CIVIL LIBERTIES UNION,
New York, N.Y., August 8, 1977.

Senator JAMES G. ABOUREZK,
Chairman, Select Committee on Indian Affairs,
Washington, D.C.

(Attention of Tony Strong).

DEAR SENATOR ABOUREZK: Thank you for the opportunity to testify before your committee on August 4 regarding S. 1214. At the conclusion of my testimony Senator Hatfield, who was then presiding, requested that I provide the committee with proposed statutory language that reflect my testimony and the written statement I previously provided, a copy of which is attached hereto.

My first recommendation was that the bill should provide for notice to the tribe and/or natural parents whenever an Indian child, previously adopted or in foster care by order of a nontribal authority, is either institutionalized or transferred to a new foster home. (See page 4 of my written statement, pars. 1 and 2.) Accordingly, I propose the following new section:

"Whenever an Indian child previously placed in foster care or for adoption by any non-tribal authority is committed or placed, either voluntarily or involuntarily, in any public or private institution, including but not limited to a correctional facility, institution for juvenile delinquents, mental hospital, or halfway house, or is transferred from one foster home to another, notification shall forthwith be made to the child's tribe of origin and to his or her natural parents. Such notice shall include the exact location of child's present placement and the reasons for that placement. Notice shall be made before the transfer of the child is effected, if possible, and in any event within 72 hours thereafter."

My second concern was that the bill does not limit the exercise by non-tribal authorities of temporary placement power in circumstances of imminent danger (see p. 3 of my written statement).

Accordingly, a new section should provide:

"In the event that a duly constituted state agency or any representative thereof has good cause to believe that the life or health of an Indian child is in imminent danger, the child may be temporarily removed from the circumstances giving rise to the danger provided that notice shall be given to the tribal authorities and the natural parents, if the latter can be located, within 24 hours of the child's removal. Notice shall include the child's exact whereabouts and the precise reasons for his or her removal. Within 48 hours of removal a hearing shall be held to determine whether good cause for the removal does in fact exist and whether the tribal authorities or the natural parents can provide for the child's care until a further custody determination can be made."

Finally, I expressed concern that the bill's language does not adequately reflect its intention to regulate only placements made by nontribal authorities. The bill does not intend to interfere with tribal or parental placement decisions. (See my written statement, p. 3.) Accordingly, in the definition of "child placement" on line 3 of the bill at page 5, after the word "private," the following should be inserted: "other than custody arrangements made by a natural parent or a tribal authority."

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I also noted in my testimony (p. 3, last paragraph) that section 101(d) appears to give private individuals, groups or institutions the authority to seize Indian children for 30 days without even notifying the parents or the tribe. I understand, however, that your committee is in the process of either eliminating, modifying or clarifying this section.

I hope these suggestions are useful, I am pleased to be of service to the committee.

Yours sincerely,

RENA K. UVILLER,
Director, Juvenile Rights Project.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.,
New York, N.Y., October 20, 1977.

Senator JAMES ABOUREZK,
Chairman, Select Committee on Indian Affairs, U.S. Senate,
Washington, D.C.
(Attention of Ms. Patty Marks).

DEAR PATTY: Steve Unger of our office suggested that I send you suggestions on the master plan for the construction of locally convenient day schools to afford Indian parents an opportunity to educate their children without exposing them to the hazards of the boarding school living arrangements.

I am enclosing a draft proposal that this association, Chet Sprague of the Massachusetts Institute of Technology School of Architecture and Planning and Dillon Platero of the Navajo Office of Education worked out several months ago. It seems to me that a national plan would follow along similar lines.

The master plan proposal that we had sketched out is based upon a 6-month work schedule and was necessarily less detailed than the kind of detail that could be provided in a master plan developed over a 12-month-period.

As page 1, item 6, indicates in our proposal, a method of approximating costs would be developed. A master plan developed over a 12-month-period should include not merely a method, but the application of this method, so that the final master plan includes reasonably close cost approximations. (I should also add that our proposal was based on a projected cost of approximately $70,000 and this, too, made it necessary to reduce the specificity of costs for each of the schools. Without a great deal of additional expense, the congressionally authorized master plan could provide this specificity.)

Steve suggested that S. 1214 be amended to stipulate the time period during which correcting the situation should be accomplished. We believe that a 5- to 7-year-period is a reasonable time. Unless there is some kind of time limit, I am afraid that the BIA will develop a master plan that stretches its program out over a generation or two.

Sincerely yours,

WILLIAM BYLER,
Executive Director.

PROPOSAL—MASTER PLAN FOR NAVAJO SCHOOL FACILITIES

The Navajo Nation and the Bureau of Indian Affairs have determined that it is sound educational and social policy to afford all Navajo students the opportunity to attend locally convenient day schools and to have access to long-term or emergency boarding facilities that are closer to home.

At present, approximately half of all Navajo students—constituting almost 90 percent of those attending BIA schools—attend boarding schools, usually at inconvenient distances from their homes; and large numbers of day students attending public and BIA schools are bused over excessively long distances.

A master plan must be developed to provide a sound basis for decisionmaking, funding, and other action to implement Federal and tribal policy in a cost-effective and timely manner. The plan must reflect Navajo community standards and aspirations and provide for maximum-local community participation in the governance of schools.

The Navajo Division of Education staff and Consultants proposes to prepare a master plan that will indicate and map:

(1) Proposed location of all schools;

(2) How and where existing facilities and roads might be utilized to serve more children better;

(3) Where new facilities and/or roads are needed and desired;

(4) The geographical area and approximate number of students that each school would serve; and

(5) Approximate busing distances and times.

In addition, the master plan would provide:

(6) A method of approximating costs regarding the construction of new, and the rehabilitation of existing, facilities and roads and the cost of busing;

(7) An exposition of the arguments behind the decisions made in preparing the plan;

(8) A tabulation of changes necessary to achieve the conditions proposed in the plan, given the present situation as the starting condition;

(9) A description of various alternatives for implementing the proposed plan;

(10) An analysis of each alternative in terms of degree and type of change necessary over various timeframes; and

(11) An analysis, in some detail, of the impact of the plan on selected local communities.

In order to produce the master plan, we will gather information that can answer the following questions:

(1) What is the population distribution reservation-wide of school-age Navajos? What have been population changes, both as to size and location, over the past 10 to 20 years, and what are future projections? What factors are causing these changes? How has home location changed in relation to school location over recent years?

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(2) Where are existing and appropriate school facilities now located? How large are these facilities? What is their present use? What are future plans for school construction?

(3) Where is housing located that can be used by teachers? What are future plans?

(4) What is the road network of the entire reservation? What are future plans for improvement and expansion?

(5) Where is water available and acceptable in appropriate quality and quantity?

(6) Where are fuel sources and where are utilities available including power and communications? What are future plans for expanding distribution?

(7) What are reservation-wide patterns of weather differences (i.e., the occurrence frequency and amount of snow, ice, and rain)? What are subsoil and drainage conditions such as affect road passability?

(8) What are applicable codes, laws and regulations that govern location and condition of education facilities? How flexible are these?

(9) Where are all Head Start, kindergarten, special education, prevocational, and secondary vocational programs, located? How do these handle problems of scheduling, transportation equipment, and teacher recruitment and housing? How many students attend these programs? What inhibits attendançe and to what extent? Where do these students live—that is, how far from school? What type of roads do they travel over, and in what kind of weather?

Our preliminary reconnaisance has determined that the information necessary to answer the above questions for BIA schools is largely available at BIA offices in Gallup, Albuquerque, Window Rock, and local BIA agencies.

Public school information is located in two respective state education offices and in the public school districts. The Navajo Division of Education has collected information on both the above.

There are additional factors that will also need to be assessed. The Navajo Nation, the BIA, the Indian Health Service, the public school districts, and local communities, each has its own history, policies, attitudes, and plans regarding school locations, school types and sizes, roads, the busing of students and/or teachers, the role of local parents in the governance of schools, and the proper relationship of elementary schools to high schools and to other educational, cultural and recreation programs that exist or are needed in each area of the Navajo Nation.

Understanding these factors is necessary in order to determine optimum numbers of students per school, travel time to school, safety standards, transportation modes, and housing for teachers.

The information regarding the above factors will be gathered through an early stage of the project and combined with the data gathered under questions numbered 1 to 9 above in order to produce maps that will analyze the interplay of all factors and finally will describe proposed geographic distribution of primary, elementary, a junior high, high school, special and vocational schools that are large enough to be socially, economically, and educationally valid, and at the same time, convenient to student homes and sites for future economic development and planning.

The attempt will be to maximize student options for attending these schools—or close-to-home boarding schools—while minimizing the dependence on long distance busing or on distant boarding schools. The master plan will attempt to maximize the use of existing facilities and roads, where these meet local acceptance, and minimize the need for new school and road construction. Finally, future construction will take into account centers for economic development, should these arise.

Because of time constraints and the great size of the Navajo Reservation, the studies that are made to prepare the master plan and the master plan itself cannot focus reservation-wide on local detail, such as the specific location of needed road improvement or the specific nature and itemized cost of necessary facilities renovation. However, to overcome the effect of some of these limitations, the master plan will be supplemented by an analysis focusing in some detail in one or two small segments of the reservation and study and describe the ramifications of the proposed approach in two or more local areas.

The final product, constituting a master plan with accompanying maps and supporting data and analysis, will be useful to the Navajo Nation, BIA and to other agencies in identifying and initiating procedures and funding proposals that can achieve over the short term and over an extended period of time the goals mentioned above in the preamble. It can be completed in time to develop specific funding proposals for fiscal year 1978.

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Appendix J

House Report (Less Dissenting Views)

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No.–1386

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ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES

JULY 24, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 12533]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12533) to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, beginning on line 3, strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Indian Child Welfare Act of 1978".

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power*** To regulate Commerce*** with Indian tribes "and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

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(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

ec. 3. The Congress hereby declares that it is the policy of this Nation, in illment of its special responsibility and legal obligations to the American ian people, to protect the best interests of Indian children and to promote the bility and security of Indian tribes and families by the establishment of minim Federal standards for the removal of Indian children from their families the placement of such children in foster or adoptive homes which will reflect unique values of Indian culture, and by providing for assistance to Indian es in the operation of child and family service programs.

ec. 4. For the purposes of this Act, except as may be specifically provided erwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contracts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697), as amended;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code. In any case where it has been judicially determined that a reservation has been diminished or the boundaries disestablished, the term shall include the lands within the last recognized boundries of such diminished reservation prior to enactment of the statute which resulted in the diminishment or disestablishment;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code of custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

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(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Sec. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

Sec. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 101, 102, and 103 of this Act.

Sec. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in paragraph (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

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(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

SEC. 106(a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntary consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

SEC. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provision of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population on homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referal jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Tegister of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

Sec. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdicton over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction betweeen States and Indian tribes.

b) Such agreements may be revoked by either party upon one hundred and
nty days written notice to the other party. Such revocation shall not affect any
on or proceeding over which a court has already assumed jurisdiction, unless
agreement provides otherwise.

ec. 110. Where any petitioner in an Indian child custody proceeding before a
te court has improperly removed the child from custody of the parent or Indian
todian or has improperly retained custody after a visit or other temporary
nquishment of custody, the court shall decline jurisdiction over such petition
shall forthwith return the child to his parent or Indian custodian unless
rning the child to his parent or custodian would subject the child to a sub-
ntial and immediate danger or threat of such danger.

ec. 111. In any case where State or Federal law applicable to a child custody
ceeding under State or Federal law procvides a higher standard of protection
he rights of the parent or Indian custodian of an Indian child than the rights
vided under this title, the State or Federal court shall apply the State or Federal
ndard.

ec. 112. Nothing in this title shall be construed to prevent the emergency re-
val of an Indian child from his parent or Indian custodian or the emergency
cement of such child in a foster home or institution, under applicable State
, in order to prevent imminent physical damage or harm to the child. The State
hority, official, or agency involved shall insure that the emergency removal or
cement continues only for a reaosnable time and shall expeditiously initiate a
ld custody proceeding subject to the provisions of this title, transfer the child
he jurisdiction of the appropriate Indian tribe, or restore the child to the
ent or Indian custodian, as may be appropriate.

ec. 113. None of the provisions of this title, except section 101(a), shall affect
roceeding under State law for foster care placement, termination of parental
ts, preadoptive placement, or adoptive placement which was initiated or
pleted prior to the enactment of this Act, but shall apply to any subsequent
ceeding in the same matter or subsequent proceedings affecting the custody
lacement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

ec. 201. (a) The Secretary is authorized to make grants to Indian tribes and
nizations in the establishment and operation of Indian child and family
ice programs on or near reservations and in the preparation and implementa-
of child welfare codes. The objective of every Indian child and family service
gram shall be to prevent the breakup of Indian families and, in particular,
nsure that the permanent removal of an Indian child from the custody of his
ent or Indian custodian shall be a last resort. Such child and family service
grams may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

b) Funds appropriated for use by the Secretary in accordance with this sec-
may be utilized as non-Federal matching share in connection with funds pro-
d under titles IV–B and XX of the Social Security Act or under any other
eral financial assistance programs which contribute to the purpose for which
funds are authorized to be appropriated for use under this Act. The pro-
on or possibility of assistance under this Act shall not be a basis for the

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denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally-assisted program. For purposes of qualifying for assistance under a federally-assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation, and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (80 Stat. 381).

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

SEC. 302.(a)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest groups in the consideration and formulation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of this Act, the Secretary shall present he proposed rules and regulations to the Select Committee on Indian Affairs of he United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives.

(3) Within eight months from the date of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of this Act, the Secretary shall promulgate ules and regulations to implement the provisions of this Act.

(b) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revisions or mendments to such rules and regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives and shall, to the extent practicable, onsult with tribes, organizations, and groups specified in subsection (b)(1) of his section, and shall publish any proposed revisions or amendments in the Federal Register not less than sixty days prior to the effective date of such rules and egulations in order to provide adequate notice to, and to receive comments from, ther interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

Sec. 401. (a) It is the sense of Congress that the absence of locally convenient ay schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare, in consultation with ppropriate agencies in the Department of Health, Education, and Welfare, a eport on the feasibility of providing Indian children with schools located near heir homes, and to submit such report to the Select Committee on Indian Affairs f the United States Senate and the Committee on Interior and Insular Affairs of he United States House of Representatives within two years from the date of his Act. In developing this report the Secretary shall give particular consideraion to the provisions of educational facilities for children in the elementary rades.

Sec. 402. Within sixty days after enactment of this Act, the Secretary shall end to the Governor, Chief Justice of the highest court of appeal, and the Attorney General of each State a copy of this Act, together with Committee eports and an explanation of the provisions of this Act.

Sec. 403. If any provision of this Act or the applicability thereof is held invalid, he remaining provisions of this Act shall not be affected thereby.

PURPOSE

The purpose of the bill (H.R. 12533), introduced by Mr. Udall et l.,[1] is to protect the best interests of Indian children and to promote he stability and security of Indian tribes and families by establishing ninimum Federal standards for the removal of Indian children from heir families and the placement of such children in foster or adoptive omes or institutions which will reflect the unique values of Indian ulture and by providing for assistance to Indian tribes and organizaions in the operation of child and family service programs.

BACKGROUND

> * * * I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done * * *.[2]

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[1] H.R. 12533 was introduced by Representatives Udall, Roncalio, Baucus, Bingham, lonin, Burke of California, Phillip Burton, Carr, Dellums, Fraser, Miller of California, iernhoover, Seiberling, Stark, Tsongas, Vento, and Weaver. A similar bill, S. 1214, has een approved by the Senate.

[2] Testimony of Valancia Thacker before Task Force 4 of the American Indian Policy eview Commission.

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The wholesale separation of Indian children from their familieis is perhaps the most tragic and destructive aspect of American Indian life today.

Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.

The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967–68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally-recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K–12, live at boarding schools. A number of Indian children are also institutionalized in mission schools, training schools, etc.

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 States surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes. In Minnesota today, according to State figures, more than 90 percent of nonrelated adoptions of Indian children are made by non-Indian couples. Few States keep as careful or complete child welfare statistics as Minnesota does, but informed estimates by welfare officials elsewhere suggest that this rate is the norm. In most Federal and mission boarding schools, a majority of the personnel is non-Indian.

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.

Standards

The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. Very few Indian children are removed from their families on the grounds of physical abuse. One study of a North Dakota reservation showed that these grounds were advanced in only 1 percent of the cases. Another study of a tribe in the Northwest showed the same incidence. The remaining 99 percent of the cases were argued on such vague grounds as "neglect" or "social deprivation" and on allegations of the emotional damage the children were subjected to by living with their parents. Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers.

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.

Indian child-rearing practices are also misinterpreted in evaluating a child's behavior and parental concern. It may appear that the child is running wild and that the parents do not care. What is labelled "permissiveness" may often, in fact, simply be a different but effective way of disciplining children. BIA boarding schools are full of children with such spurious "behavioral problems."

One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally in areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again cultural biases frequently affect decisionmaking. The late Dr. Edward P. Dozier of Santa Clara Pueblo and other observers have argued that there are important cultural differences in the use of alcohol. Yet, by and large, non-Indian social workers draw conclusions about the meaning of acts or conduct in ignorance of these distinctions.

The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to contradict the allegations offered by the social workers. Rejecting the notion that poverty and cultural differences constitute social deprivation and psychological abuse, the Association argues that the State must prove that there is actual physical or emotional harm resulting from the acts of the parents.

The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values. Recognizing that in some instances it is necessary to remove children from their homes, community leaders argue that there are Indian families within the tribe who could provide excellent care, although they are of modest means. While some progress is being made here and there, the figures cited above indicate that non-Indian parents continue to furnish almost all the foster and adoptive care for Indian children.

Due process

The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel to or have the supporting testimony of expert witnesses.

Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.

The conflict between Indian and non-Indian social systems operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.

Economic incentives

In some instances, financial considerations contribute to the crisis. For example, agencies established to place children have an incentive to find children to place.

Indian community leaders charge that federally-subsidized foster care programs encourage some non-Indian families to start "baby farms" in order to supplement their meager farm income with foster care payments and to obtain extra hands for farmwork. The disparity between the ratio of Indian children in foster care versus the number of Indian children that are adopted seems to bear this out. For example, Wyoming in 1969, Indians accounted for 70 percent of foster care lacements but only 8 percent of adoptive placements. Foster care ayments usually cease when a child is adopted.

In addition, there are economic disincentives. It will cost the Fed- ral and State Governments a great deal of money to provide Indian ommunities with the means to remedy their situation. But over the ng run, it will cost a great deal more money not to. At the very least, s a first step, we should find new and more effective ways to spend resent funds.

ocial conditions

Low-income, joblessness, poor health, substandard housing, and w educational attainment—these are the reasons most often cited for e disintegration of Indian family life. It is not that clear-cut. Not l impoverished societies, whether Indian or non-Indian, suffer from tastrophically high rates of family breakdown.

Cultural disorientation, a person's sense of powerlessness, his loss of lf-esteem—these may be the most potent forces at work. They arise, large measure, from our national attitudes as reflected in long- tablished Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate me Indian patents from their society that they abandon their chil- ren at hospitals or to welfare departments rather than entrust them the care of relatives in the extended family. Another expression of is the involuntary, arbitrary, and unwarranted separation of milies.

It has already been noted that the harsh living conditions in many dian communities may prompt a welfare department to make un- arranted placements and that they make it difficult for Indian people qualify as foster or adoptive parents. Additionally, because these nditions are often viewed as the primary cause of family breakdown d because generally there is no end to Indian poverty in sight, gencies of government often fail to recognize immediate, practical eans to reduce the incidence of neglect or separation.

As surely as poverty imposes severe strains on the ability of familes function—sometimes the extra burden that is too much to bear—so o family breakdown contributes to the cycle of poverty.

CONSTITUTIONALITY

The Department of Justice, in its reports to the committee of ebruary 9 and May 23, 1978, raises questions regarding the constitu- onality of certain of the provisions of the legislation. While the mmittee did not agree with the Department on these issues, certain hanges were made in the legislation which will meet some of the epartment's concerns. Other issues remain, however. In view of the nstitutional doubts of the Department, the committee feels com- elled to respond.

upremacy clause

Clause 2 of article VI of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When Congress legislates pursuant to its delegated powers, conflicting State law and policy must yield, *Gibbons* v. *Ogden*, 22 U.S. 1 (1824); *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945); *Nash* v. *Florida Industrial Comm.*, 389 U.S. 235 (1967); *Lee* v. *Florida*, 392 U.S. 378 (1968); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'" *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); State courts have both the power and duty to enforce obligations arising under Federal law. *Claflin* v. *Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa* v. *Katt*, 330 U.S. 386 (1947).

Plenary power of Congress over Indian affairs

The question is then: "Does Congress have power to legislate as proposed in the bill?" Clause 3, section 8, article I of the Constitution provides:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In an unbroken line of Supreme Court decisions, beginning with Chief Justice John Marshall's decision in *Worcester* v. *Georgia*, 31 U.S. 515 (1832):

> (The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regualting commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.

And ending with *United States* v. *Wheeler*—U.S.—(March 22, 1978):

> (There is an) undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.

The Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters. The cases are far too numerous to cite, but two cases will serve to exemplify this position. In *U.S.* v. *Kagama*, 118 U.S. 375 (1886) the Court said:

> **These Indian tribes are wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political**

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> rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

And in *United States* v. *Nice*, 241 U.S. 591 (1916), the Court held:

> The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off an Indian reservation is well settled * * *. Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority "to regulate Commerce * * * with the Indian tribes", and, second, the dependent relation of such tribes to the United States.

It cannot be questioned that Congress has broad, unique powers with respect to Indian tribes and affairs, There is only one caveat: While those powers may be plenary, the exercise may not be arbitrary. For example, Congress may not take Indian property without just compensation nor may it establish a religion for Indian tribes.

Plenary power and child welfare

The question then is: "Is the regulation of child custody proceedings and the imposition of minimum Federal standards an appropriate exercise of Congress plenary power over Indian affairs?"

We need only cite three cases to lay the foundation for the power of Congress to legislate in this area. In *U.S.* v. *Holliday*, 70 U.S. 407 (1866), the Court said:

> Commerce with foreign Nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with Indians tribes means commerce with the individuals composing those tribes.

In *Dick* v. *U.S.*, 208 U.S. 340 (1908), the Court held:

> As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has power to say with whom, and on what terms, they shall deal * * *.

Knoepfler, in *Legal Status of American Indian & His Property* (1922), 7 Ia. L.B. 232, stated: "Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribes or as individuals."

Finally, the Maryland Court of Appeals, in a case involving the attempted adoption of an Indian child (*Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975)), stated:

> We think it plain that child-rearing is an "essential tribal relation" within * * * (the test of) *Williams* v. *Lee* (358 U.S. 217 (1959)).

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And again:

> * * * (C)onsidering that there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children, we agree with the conclusion expressed in *Wisconsin Potowatomies* (*Wisconsin Potowatomies* v. *Houston*, 393 F. Supp. 719 (1973)) that in determining subject matter jurisdiction in such circumstances, the only rational approach is to determine the domicile of the Indian child. By using the Indian child's domicile as the State's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of childrearing and maintenance of tribal identity.

Even this State court recognized that a tribe's children are vital to its integrity and future. Since the United States has the responsibility to protect the integrity of the tribes, we can say with the *Kagama* court, "* * * there arises the duty of protection, and with it the power."

Geographic scope of plenary power

Is the Congress limited to Indian lands or to the reservation in th exercise of its plenary power over Indian affairs? The answer is clearly, "No". Again, we need only cite one or two cases to support thi conclusion.

In *U.S.* v. *Holliday*, supra, the Court said:

> If commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress; although within the limits of a State. The locality of the traffic *can have nothing to do with the power*. (Emphasis added.) The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

In *Perrin* v. *U.S.*, 232 U.S. 487 (1914), the Court held:

> We come, then, to the objection that the prohibition in the act of 1894 confers an unnecessarily extensive territory and is not limited in duration, and so transcends the power of Congress. As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians Congress is invested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

We cite again *U.S.* v. *Nice*, supra: "The power of Congress t regulate or prohibit traffic with tribal Indians within a State *whethe upon or off an Indian reservation* is well settled * * *." (Emphasi added.)

Membership and plenary power

The question occurs, as raised by the Department of Justice in its report: "Is the power of Congress limited, constitutionally, to only those individuals who are formally enrolled as members of an Indian tribe?" Again, the answer is negative.

In 1934, Congress enacted the Indian Reorganization Act of June 18, 1934 (48 Stat. 988). Section 19 defined "Indians" as:

> * * * all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Categories two and three of this definition are clearly not enrolled members of a tribe, by definition; yet Congress conferred the rights and benefits of the act upon this class of Indians, including the right to preference in Federal employment in the Bureau of Indian Affairs and the Indian Health Service. When the Supreme Court was called upon to construe the constitutionality of the Indian preference section of the Indian Reorganization Act in the case of *Morton* v. *Mancari*, 417 U.S. 535 (1974), it was aware that Indians who were not enrolled members of a tribe were made eligible for this preference by act of Congress, but did not strike the law down as invidiously discriminatory.

The reason it did not was because it was aware of its own past decisions with respect to congressional power over Indians not members of a tribe, Congress may disregard the existing membership rolls and direct that per capita distributions be made upon the basis of a new roll, even though such act may modify prior legislation, treaties, or agreements with the tribe. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899). Thus, the Supreme Court in the case of *Sizemore* v. *Brady*, 235 U.S. 441 (1914), said:

> * * * Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe * * *.

In *Federal Indian Law*, at page 45 in note 10, it is said:

> It has been held that Congress is not bound by the tribal rule regarding membership and may determine for itself whether a person is an Indian from the standpoint of a Federal criminal statute. *United States* v. *Rogers*, 4 How. 567 (1846).

In the very recent case of *United States* v. *Antelope*, 45 U.S.L.W. 4361 (April 19, 1977), the Supreme Court said:

> It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction. * * *

Federal District Court Judge Battin, in *Dillon* v. *Montana*, (1978), ordered:

> [illegible]. That for purposes of applying this (Federal) exemption, [illegible] class of "Indian persons" * * * shall include persons possessing the following qualifications:

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> (a) that the person possess some quantum of Indian blood;
>
> (b) that the person be recognized as an Indian by the community in which he or she lives, and that the putative taxpayer's wardship status has not been terminated by the government;
>
> (c) that the person be an enrolled member of a federally recognized Indian tribe *or otherwise eligible to be recognized as an Indian ward by the Federal Government.* (Emphasis added.)

If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

Supremacy clause versus States' rights

From the foregoing, it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody. The final question is, paraphrasing the Department of Justice; "Does Congress have power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a State matter?"

First, let it be said that the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations.

The decisions of the Supreme Court will set to rest the principal objection. It is appropriate to begin with the landmark case of *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), where the Court stated:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

In *Brown* v. *Western Ry. Co.*, 338 U.S. 294 (1949), the Court said:

> The argument is that while state courts are without power to detract from "substantive rights" granted by Congress * * * they are free to follow their own rules of "practice" and "procedure" * * *. A long series of cases previously decided, from which we see no reason to depart,

> makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by forms of local practice. * * * Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws.

In *Dice* v. *Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359 (1952), the Court held:

> Congress * * * granted petitioner a right * * *. State laws are not controlling in determining what the incidents of this Federal right shall be."

Chief Justice Holmes, in *Davis* v. *Wechsler*, 263 U.S. 22 (1923), put it succinctly:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

We will quote merely two other cases to support the proposition that Congress may, constitutionally, impose certain procedural burdens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody.

The Court, in *American Railway Express Co.* v. *Levee*. 263 U.S. 19 (1923), held that:

> The laws of the United States cannot be evaded by the forms of local practice * * *. The local rules applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.

And finally, in an extensive quote from the landmark decision of the Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1912), we examine the duty of State courts, otherwise having jurisdiction over the subject matter, to enforce Federal substantive rights:

> We come next to consider whether rights arising from congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion * * *. (The State court was of the opinion that it could decline to enforce the Federal right) because * * * it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standard of right established by congressional act and in others the different standards recognized by the laws of the State. * * * It never has been supposed that courts are at liberty to decline cognizance of cases merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.
>
> We conclude that rights arising under the (Federal) act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion.

Conclusion

Under the rules of the House, this committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

SECTION-BY-SECTION ANALYSIS

As amended by the committee, the legislation completely rewrites S. 1214 as passed by the Senate. In addition, the amendment in the nature of a substitute for H.R. 12533, as further amended, differs significantly from H.R. 12533 as introduced. The following is a section-by-section analysis of the bill as reported with appropriate explanations.

Section 1

Section 1 provides that the bill may be cited as the "Indian Child Welfare Act of 1978".

Section 2

Section 2 contains congressional findings. As amended, it lays the foundations for the power and responsibility of the Congress to legislate in the field of Indian child welfare.

Section 3

Section 3 contains a congressional declaration of policy. As amended, the section makes clear that the underlying principle of the bill is in the best interest of the Indian child. However, the committee notes that this legal principle is vague, at best. In a footnote on page 835 in the decision of *Smith* v. *OFFER*, 431 U.S. 820 (1977), the Supreme Court stated:

> Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child", to avoid decisions resting on subjective values."

SECTION 4

Section 4 defines various terms used in the bill.

Paragraph (1) defines the term "child custody placement" by defining four discrete legal proceedings included within the term. S. 1214 and H.R. 12533, as introduced, used the term "placement" which proved to be ambiguous with respect to the various provisions of the bill. The terms may not be current in the legal lexicon of domestic relations and might have some different or overlapping meaning in normal usage. The terms are intended to have the meaning given to them in the paragraph.

Paragraph (2) defines the term "extended family member". The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of parental neglect. It should be noted that the concept was not unknown in the non-Indian world. Justice Brennan, in his concurring opinion in *Moore* v. *East Cleveland*, 431 U.S. 494, 508 (1977), noted:

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia * * * . The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. The "extended family" * * * remains not merely still a pervasive living pattern, but under goad of brutal economic necessity, a prominent pattern—virtually a means of survivial—for large numbers of the poor and deprived minorities of our society.

Paragraph (3) defines "Indian" as any person who is a member of an Indian tribe.

Paragraph (4) defines "Indian child." The committee rejects the use of the term "merely" by the Department of Justice to qualify the eligibility of an Indian to be a member of an Indian tribe, particularly with respect to a minor. Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe. We do note that, for an adult Indian, there is an absolute right of expatiration from one's tribe. *U.S. ex rel. Standing Bear* v. *Crook*, 25 Fed. Cas. No. 14891 (1879). However, this right has no relevance to an Indian child who, because of his minority, does not have the capacity to make a reasoned decision about exercising his right to enroll in his tribe.

Paragraph (5) defines "Indian child's tribe." It is assumed that the appropriate official can make a reasonable judgment about which Indian tribe the Indian child has the more significant contacts in cases where the child is eligible for membership in more than one tribe.

Paragraph (6) defines "Indian custodian." Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.

Paragraph (7) defines "Indian organization".

Paragraph (8) defines "Indian tribe".

Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Paragraph (10) defines the term "reservation". For the limited purpose of jurisdiction over Indian child custody proceedings, the last sentence of the paragraph addresses and varies the holding in cases such as *DeCoteau* v. *District Court*, 420 U.S. 425 (1975), and *Rosebud* v. *Kneip*, 97 S. Ct. 1361 (1977).

Paragraph (11) defines "Secretary" as the Secretary of the Interior.

Paragraph (12) defines "tribal court".

Section 101

Subsection (a) provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless Federal law has vested that jurisdiction in the State. It further provides that the domicile of an Indian child who is the ward of a tribal court is deemed to be that of the court, which is generally in accord with existing law. The provisions on exclusive tribal jurisdiction confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. *Wisconsin Potowatomies* v. *Houston*, 393 F. Supp. 719 (1973); *Wakefield* v. *Little Light*, 276 Md. 333 (1975); *In re Matter of Greybull*, 543 P. 2d 1079 (1975); *Duckhead* v. *Anderson et al.*, Wash. Sup. Ct., November 4, 1976.

Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.

Subsection (c), for purposes of State proceedings for foster care placement or termination of parental rights, confers a right of intervention upon the Indian custodian and the Indian child's tribe. The committee is advised that the parents would have this right in any event.

Subsection (d) provides that the public acts, records, and judicial proceedings of an Indian tribe with respect to child custody proceedings shall be given full faith and credit by other jurisdictions to the same extent that such jurisdictions extend full faith and credit in other circumstances.

Section 102

Subsection (a) requires that, in an involuntary proceeding in State courts with respect to an Indian child, the moving party must provide certain notices to the parent or Indian custodian and the tribe. In lieu notice to the Secretary of the Interior is provided in cases where the location of the individual or tribe cannot reasonably be determined. The committee expects that the Secretary would make diligent efforts to relay such notice to the parent, custodian, and/or tribe. The subsection was amended to provide that the court would require such notice where it had actual or constructive knowledge of the Indian affiliation of the child.

Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court-appointed counsel in any involuntary State proceeding for foster care placement or termination of parental rights. Where State law makes no provision for such appointment, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of such counsel. In adopting this amendment, the committee notes with approval the decision of the U.S. District Court for the Southern District of Florida in *Davis* v. *Page*, 442 F. Supp. 258 (1977), wherein the court held:

> Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks. (p. 260.)
>
> The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment. (p. 261.)
>
> The parent's interest in the custody and companionship of his child and the grievous nature of the loss which accompanies interference with that interest suffice to mandate the provision of counsel under a balance of interest test without further inquiry * * *. (T)he right to counsel inevitably emerges as an element of procedural due process. (p. 263.)

Subsection (c) provides that each party to a State court proceeding for foster care or termination of parental rights shall have a right to examine relevant documents filed with the court upon which it may base its decision. The committee was advised that, in many cases, Indian parents or custodians have been, practically, denied the right.

Subsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.

Subsections (e) and (f) establish evidentiary standards for foster care placement or termination of parental rights. As introduced, H.R. 12533 required a "beyond a reasonable doubt" standard for both actions. While the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated. The phrase "qualified expert witnesses" is meant to apply to expertise beyond the normal social worker qualifications.

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Section 103

Subsection (a) provides that consent to foster care placement or termination of parental rights must be executed in writing before a judge of a court of competent jurisdiction and that the judge must be satisfied the consequences of such consent was fully understood by the parent or custodian. Where the judge determines the parent or custodian does not have a sufficient command of the English language, it should be interpreted into a language such person does understand. The committee does not intend that the execution of the consent need be in open court where confidentiality is requested or indicated.

Subsection (b) permits a parent or Indian custodian to withdraw consent to a foster care placement at any time.

Subsection (c) authorizes a parent or Indian custodian to withdraw consent to termination of parental rights or adoptive placement of an Indian child at any time prior to the entry of a final decree.

Subsection (d) authorizes the setting aside of a final decree of adoption of an Indian child upon petition of the parent upon grounds that consent thereto was obtained through fraud or duress. This right is limited to 2 years after entry of the decree, unless a longer period is provided under State law. With respect to subsections (b), (c), and (d), the committee notes that nothing in those subsections prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section 102, to prevent the return of the child, but does not wish to be understood as routinely inviting such actions.

Section 104

Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under sections 101, 102, or 103 were violated.

Section 105

Section 105, as a whole, contemplates those instances where the parental rights of the Indian parent has already been terminated. The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.

Subsection (a) provides that, in the absence of good cause to the contrary, a preference shall be given to adoptive placement of an Indian child with the extended family; a member of the child's tribe; or another Indian family. This subsection and subsection (b) establish a Federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family.

Subsection (b) establishes a similar preference for foster care or preadoptive placements of an Indian child. The language was amended to conform to language in H.R. 7200 of this Congress relative to foster care and adoptive placements in the least restrictive settings.

Subsection (c) provides that the tribe may establish a different order of preference which will be followed in lieu of the Federal standards as long as such order is consistent with the least restrictive setting standard in subsection (b). Where appropriate, the preference of the child or parent shall be considered and a request for anonymity of a consenting parent shall be given weight in applying the preferences. While the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian.

Subsection (d) provides that the standards to be used in meeting the preference shall be those prevailing in the relevant Indian community. All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.

Subsection (e) requires the State to maintain records showing what efforts have been made to comply with the preference standards of this section and to make such records available to the tribe and Secretary.

Section 106

Subsection (a) authorizes a biological parent of an Indian child to petition for the return of the child when a previous adoption of such child fails. The child shall be returned to the parent upon such petition, unless there is a showing, in a proceeding subject to the provisions of section 102, that such return would not be in the best interests of the child.

Subsection (b) provides that when an Indian child is being removed from a foster care home for purposes of further foster care placement, preadoptive placement, or adoptive placement, such further placement shall be subject to the provisions of this act, unless the child is being returned to the parent or Indian custodian.

Section 107

Section 107 confers a right upon an adult Indian, who was the subject of adoption, to secure necessary information from the court which entered the decree to enable the person to protect and secure any rights he may have from his tribal affiliation. There appears to be a growing trend in State law, supported by developing psychology, that an adopted individual has an inherent right to know his genealogical background. However, this section and section 301 are not aimed at that right. These provisions are aimed at different, but no less valuable rights. One, these provisions will help protect the valuable rights an individual has as a member or potential member of an Indian tribe and any collateral benefits which may flow from the Federal Government because of such membership. Two, these provisions will help protect the rights and interests of an Indian tribe in having its children remain with or become a part of the tribe.

Section 108

Subsection (a) authorizes an Indian tribe, which became subject to State jurisdiction under Public Law 83-280 or any other Federal law, to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior including a suitable plan.

Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on

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such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

Subsection (c) provides for publication of notice of reassumption by the Secretary in the Federal Register and for the effective date of such reassumption.

Subsection (d) provides that reassumption shall not affect ongoing proceedings at the time of reassumption unless provided for in an agreement under section 109.

Section 109

Section 109 authorizes Indian tribes and States to enter into mutual agreements or compacts with respect to jurisdiction over Indian child custody proceedings and related matters. It also provides for revocation of such agreements by the parties.

Section 110

Section 110 establishes a "clean hands" doctrine with respect to petitions in State court for the custody of an Indian child by a person who improperly has such child in physical custody. It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and immediate physical danger or threat of physical danger to the child. It is not intended that any such showing be by or on behalf of the wrongful petitioner.

Section 111

Section 111 provides that, where State law affords a higher degree of protection of the rights of the parent or Indian custodian, such standard will be applied by the State court in lieu of the related provision of this title. The section was amended by the committee to include any relevant protection or standard established under Federal law.

Section 112

Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

Section 113

Section 113 provides for the orderly phasing in of the effect of the provisions of this title. As amended, it provides that none of the provisions of this title, except section 101(a), would apply to any State action for foster care placement; for termination of parental rights; for preadoptive placement; or for adoptive placement which was initiated or completed prior to enactment of this act. However, it is intended that the provisions would apply to any subsequent discrete phase of the same matter or with respect to the same child initiated after enactment. For instance, if the foster care placement of an Indian child was initiated or completed prior to enactment and then, subsequent to enactment, the child was replaced for foster care, or an action for termination of parental rights was initiated, or the child was placed in a preadoptive situation, or he was placed for adoption, the provisions of the act would be applicable to those subsequent actions.

Section 201

Subsection (a) authorizes the Secretary to make grants to Indian tribes and organizations to fund Indian child and family service programs on or near the reservation and lists nonexclusionary services to be provided in such programs.

Subsection (b) permits tribes and organizations to use such grant money for non-Federal matching share with respect to titles IV–B and XX of the Social Security Act or other similar Federal programs. It would also recognize the licensing or approval of foster or adoptive homes or institutions by Indian tribes as equivalent to State licensing or approval.

Section 202

Section 202 authorizes the Secretary to make similar grants to Indian organizations for off-reservation programs.

Section 203

Section 203 authorizes the Secretary of the Interior and the Secretary of Health, Education, and Welfare to enter into joint funding agreements with respect to Indian child and family service programs, to the extent that funds are made available by appropriation acts for such purposes. The authority of the Snyder Act of November 2, 1921 (42 Stat. 208) is made available for the appropriation of funds for grants to tribes and organizations.

Section 204

Section 204 provides that, solely with respect to sections 202 and 203 of this act, "Indian" shall have the meaning assigned to it in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

Section 301

Subsection (a) provides that any State court entering a final decree of adoption of an Indian child after the date of enactment of this act shall provide a copy of such decree together with certain other basic information to the Secretary, including any affidavit of a parent requesting anonymity. The Secretary is required to maintain such information and records and to insure that such information is kept confidential. The subsection provides that such information shall not be subject to the Freedom of Information Act.

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Subsection (b) provides that, upon request of an adopted Indian child over age 18; an adoptive or foster parent of an Indian child; or an Indian child's tribe, the Secretary shall release such information as may be necessary for enrollment of the child or for otherwise protecting the rights of the child as an Indian. Where the biological parent has requested anonymity, the Secretary is authorized to certify to an Indian tribe the eligibility of an Indian child under the tribe's membership criteria without disclosing the identity of the parents, if such certification is acceptable to the tribe.

Section 302

Section 302 establishes timetables and consulting requirements for the secretarial promulgation of regulations implementing this act.

Section 401

Section 401 directs the Secretary to submit a report to the Congress on the feasibility of providing Indian children with schools located near their homes. The committee was informed of the devastating impact of the Federal boarding school system on Indian family life and on Indian children, particularly those children in the elementary grades and considers that it is in the best interests of Indian children that they be afforded the opportunity to live at home while attending school. It is noted that more than 10,000 Navajo children in grades 1 to 8 are boarded.

Section 402

Section 402 requires the Secretary, within 60 days after enactment, to provide appropriate notice and information about this act and its provisions to appropriate State officials.

Section 403

Section 403 provides that if any provision of this act is held invalid, the remaining provisions shall not be affected thereby.

LEGISLATIVE HISTORY

The Indian child welfare legislation is the outgrowth of hearings and investigations conducted in the 93d, 94th, and 95th Congress. In 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, at the urging of Indian tribes and organizations, conducted oversight hearings on the removal of Indian children from their families and the placement of such children in foster and adoptive homes. Testimony was taken from a wide spectrum of public and private witnesses which tended to confirm reports of abuses of the rights of Indian tribes, parents, and children in the process.

During the 94th Congress, Task Force IV of the American Indian Policy Review Commission, established by the act of January 2, 1975 (88 Stat. 1910), addressed the issue of Indian child placements. After a series of hearings, the task force report and findings supported the findings of the Senate oversight hearings. In the latter part of 1976 and early 1977, the Commission considered the findings and recommendations of the task force on Indian child welfare matters. In its final report to the Congress, the Commission made a number of recommendations on the issue, many of which have been included in H.R. 12533.

On April 1, 1977, Senator Abourezk introduced S. 1214 which was ferred to the Senate Select Committee on Indian Affairs. On igust 4, 1977, the Senate committee held hearings on the bill, again, king testimony from the broad spectrum of concerned parties, iblic and private, Indian and non-Indian. The committee adopted amendment in the nature of a substitute and reported the amended ll to the Senate on November 3, 1977 (S. Rept. No. 95-597). The bill ssed the Senate on November 4, 1977.

In the House, S. 1214 was referred to the Committee on Interior and isular Affairs. On February 9 and March 9, 1978, the Subcommittee Indian Affairs and Public Lands held hearings on the bill, hearing hours of testimony from 34 witnesses. The subcommittee received omments on S. 1214, either by oral testimony or written communica-on, from 3 executive departments; 20 States; 22 non-Indian private ganizations; 35 Indian organizations; and 38 Indian tribes.

On April 18, 1978, the subcommittee marked up S. 1214 and adopted amendment in the nature of a substitute. This substitute was ibsequently introduced by Mr. Udall et al. as a clean bill, H.R. 533. On June 21, 1978, the full committee took up consideration of e legislation and proceeded to the markup of H.R. 12533 in lieu of 1214. The committee adopted an amendment in the nature of a ibstitute to H.R. 12533 which was further amended. H.R. 12533, as nended, was reported from the committee favorably, by voice vote.

COST AND BUDGET ACT COMPLAINCE

Title II of the bill directs the Secretary of the Interior to institute rograms for child and family service assistance. These programs iclude authority to construct centers on and off reservations and to rovide a variety of assistance programs directed toward the stability nd integrity of the Indian family. CBO has projected a cost of pproximately $125 million over the next 5 fiscal years. The committee eels that this estimate is high and is based upon assumptions which are robably not valid, but it agrees that the costs will not exceed a total f $125 million. For instance, it assumes construction of family service enters in every case in which an Indian reservation or urban area night be eligible for such center. In fact, existing facilities, both on the eservation and in the urban areas, would probably be used to house he various programs contemplated in the bill. The analysis of H.R. 2533 by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

lon. MORRIS K. UDALL,
hairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congres-ional Budget Act of 1974, the Congressional Budget Office has pre-ared the attached cost estimate for H.R. 12533, the Indian Child Velfare Act of 1978.

Should the committee so desire, we would be pleased to provide rther details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,

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CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 11, 1978.

1. Bill No.: H.R. 12533.

2. Bill title: Indian Child Welfare Act of 1978.

3. Bill status: As ordered reported from the House Committee on Interior and Insular Affairs, June 21, 1978.

4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and to establish grants to Indian tribes and Indian organizations for the construction and operation of Indian family development centers. H.R. 12533 does not request any additional authorizations for the purposes of this bill. Rather, the act states that the new programs will be authorized under the act of November 2, 1921 (the Snyder Act). The Snyder Act provides permanent and open ended authorization for Indian programs. This bill is subject to subsequent appropriation action.

5. Cost estimate:

	Millions
Fiscal year 1979:	
Estimated additional authoriztaion	-----
Estimated costs	-----
Fiscal year 1980:	
Estimated additional authorization	27. 6
Estimated costs	6. 8
Fiscal year 1981:	
Estimated additional authorization	32. 3
Estimated costs	30. 4
Fiscal year 1982:	
Estimated additional authorization	42. 2
Estimated costs	38. 2
Fiscal year 1983:	
Estimated additional authorization	52. 4
Estimated costs	43. 0

The costs of this bill falls within budget function 500.

6. Basis for estimate: The projected cost for H.R. 12533 is based on programmatic information and assumptions supplied by the Bureau of Indian Affairs (BIA). Below are the specific assumptions for this estimate.

(1) There are 150 potential locations both on and off the reservations that would be eligible to build and operate a child development center as described in the bill. It was assumed by BIA that a maximum of 30 centers would be constructed annually at a cost in fiscal year 1980 of $658,000 per center.

(2) Once built, each center would be operated by a professional and support staff of 15. The first full year costs (fiscal year 1981) covering operating expenses for 30 centers is estimated to be $7.0 million.

(3) The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.

(4) The spendout on construction for the development center is spread over 3 years, while the spendout for operating expenses is spread over a 2-year period. The fiscal year 1980 spendout is relatively low reflecting a lagtime for planning and development of the centers.

(5) This cost estimate assumes an enactment for this bill of October 1978 with appropriation action completed and regulations issued by October 1979.

On April 1, 1977, Senator Abourezk introduced S. 1214 which was eferred to the Senate Select Committee on Indian Affairs. On ugust 4, 1977, the Senate committee held hearings on the bill, again, aking testimony from the broad spectrum of concerned parties, ublic and private, Indian and non-Indian. The committee adopted n amendment in the nature of a substitute and reported the amended ill to the Senate on November 3, 1977 (S. Rept. No. 95-597). The bill assed the Senate on November 4, 1977.

In the House, S. 1214 was referred to the Committee on Interior and nsular Affairs. On February 9 and March 9, 1978, the Subcommittee n Indian Affairs and Public Lands held hearings on the bill, hearing hours of testimony from 34 witnesses. The subcommittee received omments on S. 1214, either by oral testimony or written communica- ion, from 3 executive departments; 20 States; 22 non-Indian private rganizations; 35 Indian organizations; and 38 Indian tribes.

On April 18, 1978, the subcommittee marked up S. 1214 and adopted n amendment in the nature of a substitute. This substitute was ubsequently introduced by Mr. Udall et al. as a clean bill, H.R. 12533. On June 21, 1978, the full committee took up consideration of he legislation and proceeded to the markup of H.R. 12533 in lieu of . 1214. The committee adopted an amendment in the nature of a ubstitute to H.R. 12533 which was further amended. H.R. 12533, as mended, was reported from the committee favorably, by voice vote.

COST AND BUDGET ACT COMPLAINCE

Title II of the bill directs the Secretary of the Interior to institute rograms for child and family service assistance. These programs nclude authority to construct centers on and off reservations and to rovide a variety of assistance programs directed toward the stability nd integrity of the Indian family. CBO has projected a cost of pproximately \$125 million over the next 5 fiscal years. The committee eels that this estimate is high and is based upon assumptions which are robably not valid, but it agrees that the costs will not exceed a total of \$125 million. For instance, it assumes construction of family service centers in every case in which an Indian reservation or urban area might be eligible for such center. In fact, existing facilities, both on the reservation and in the urban areas, would probably be used to house the various programs contemplated in the bill. The analysis of H.R. 12533 by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 12533, the Indian Child Welfare Act of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 11, 1978.

1. Bill No.: H.R. 12533.

2. Bill title: Indian Child Welfare Act of 1978.

3. Bill status: As ordered reported from the House Committee on Interior and Insular Affairs, June 21, 1978.

4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and to establish grants to Indian tribes and Indian organizations for the construction and operation of Indian family development centers. H.R. 12533 does not request any additional authorizations for the purposes of this bill. Rather, the act states that the new programs will be authorized under the act of November 2, 1921 (the Snyder Act). The Snyder Act provides permanent and open ended authorization for Indian programs. This bill is subject to subsequent appropriation action.

5. Cost estimate:

	Millions
Fiscal year 1979:	
Estimated additional authoriztaion	-----
Estimated costs	-----
Fiscal year 1980:	
Estimated additional authorization	27. 6
Estimated costs	6. 8
Fiscal year 1981:	
Estimated additional authorization	32. 3
Estimated costs	30. 4
Fiscal year 1982:	
Estimated additional authorization	42. 2
Estimated costs	38. 2
Fiscal year 1983:	
Estimated additional authorization	52. 4
Estimated costs	45. 0

The costs of this bill falls within budget function 500.

6. Basis for estimate: The projected cost for H.R. 12533 is based on programmatic information and assumptions supplied by the Bureau of Indian Affairs (BIA). Below are the specific assumptions for this estimate.

(1) There are 150 potential locations both on and off the reservations that would be eligible to build and operate a child development center as described in the bill. It was assumed by BIA that a maximum of 30 centers would be constructed annually at a cost in fiscal year 1980 of $658,000 per center.

(2) Once built, each center would be operated by a professional and support staff of 15. The first full year costs (fiscal year 1981) covering operating expenses for 30 centers is estimated to be $7.9 million.

(3) The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.

(4) The spendout on construction for the development center is spread over 3 years, while the spendout for operating expenses is spread over a 2-year period. The fiscal year 1980 spendout is relatively low reflecting a lagtime for planning and development of the centers.

(5) This cost estimate assumes an enactment for this bill of October 1978 with appropriation action completed and regulations issued by October 1979.

7. Estimate comparison: None.
8. Previous CBO estimate: On November 2, 1977, CBO prepared
n estimate on S. 1214, the Indian Child Welfare Act of 1977. The
enate bill is essentially the same as H.R. 12533. However, S. 1214
id not assume the use of Snyder Act authorization and included
dditional authorization language to cover the provision of the bill
tting an authorization level of $26 million for fiscal year 1979.
9. Estimate prepared by Deborah Kalcevic.
10. Estimate approved by James L. Blum, Assistant Director for
udget Analysis.

INFLATIONARY IMPACT STATEMENT

At the level of funding estimated by the Congressional Budget
ffice, enactment of this legislation would have some minimal infla-
onary impact. This impact is lessened since the cost will be spread
ut over 5 fiscal years.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunc-
on with these legislative operations, the committee conducted no
pecific oversight hearings and no recommendations were submitted
the committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote,
commends that the bill, as amended, be enacted.

DEPARTMENTAL REPORTS

The report of the Department of the Interior, dated June 6, 1978,
nd the reports of the Department of Justice, dated February 9, 1978,
nd May 23, 1978, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., June 6, 1978.

on. MORRIS K. UDALL,
hairman, Committee on Interior and Insular Affairs, House of Repre-sentatives, Washington, D.C.

DEAR MR. CHAIRMAN: This Department would like to make its
iews known on H.R. 12533, the Indian Child Welfare Act of 1978,
nd urges the committee to make the recommended changes during
arkup of the bill. We understand the Department of Justice has
ommunicated its concerns with the bill to the committee, and we
ge the committee to amend the bill to address those concerns.

If H.R. 12533 is amended as detailed herein and as recommended
y the Department of Justice's letter of May 23, 1978, we would
commend that the bill be enacted.

Title I of H.R. 12533 would establish nationwide procedures for the
andling of Indian child placements. The bill would vest in tribal
ourts their already acknowledged right to exclusive jurisdiction over
dian child placements within their reservations. It would also pro-

vide for transfer of such a proceeding from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects.

Requirements dealing with notice to tribes and parents and consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.

Title I would also impose on State courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon a finding of indigency by the court.

State courts would also be required, under the provisions of H.R. 12533, to apply preference standards set forth in section 105 in the placing of an Indian child. These preferences would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values.

Title II of H.R. 12533, entitled "Indian Child and Family Programs," would authorize the Secretary of the Interior to make grants to Indian tribes and organizations for the establishment of Indian family service programs both on and off the reservation. Section 204 would authorize $26 million for that purpose.

Title III of H.R. 12533, entitled "Recordkeeping, Information Availability, and Timetables," would direct the Secretary of the Interior to maintain records, in a single central location, of all Indian child placements affected by the act. Those records would not be open, but information from them could be made available to an Indian child over age 18, to his adoptive or foster parent, or to an Indian tribe, for the purpose of assisting in the enrollment of that child in an Indian tribe.

Title IV of H.R. 12533, entitled "Placement Prevention Study," would direct the Secretary of the Interior to prepare and submit to Congress a plan, including a cost analysis statement, for the provision to Indian children of schools located near their homes.

Although we support the concept of promoting the welfare of Indian children, we urge that the bill be amended in the following ways.

Section 4(9) defines the term "placement." This definition is crucial to the carrying out of the provisions of title I. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be excepted from the definition of the term "placement". We believe that the protections provided by this act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

Section 101(a) would grant to Indian tribes exclusive jurisdiction over Indian child placement proceedings. We believe that section 101(a) should be amended to make explicit that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody. The bill does not address the situation where two parental views are involved. Therefore, the definition of domicile is inadequate and the use of the word "parent" as defined does not articulate the responsibilities of the courts to both parents.

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We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a), since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassumption of tribal jurisdiction in those States.

Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.

Section 101(c), regarding full faith and credit to tribal orders, should be amended to make clear that the full faith and credit intended is that which States presently give to other States.

Section 102(a) would provide that no placement hearing be held until at least 30 days after the parent and the tribe receive notice. We believe that in many cases 30 days is too long to delay the commencement of such a proceeding. We suggest that the section be amended to allow the proceeding to begin 10 days after such notice with a provision allowing the tribe or parent to request up to 20 additional days to prepare a case. This would allow cases where the parents or tribe do not wish a full 30 days' notice to be adjudicated quickly, while still affording time to the parent or tribe who needs that time to prepare a case. We also suggest that the section be amended to require the Secretary to make a good faith effort to locate the parent as quickly as possible and to provide for situations in which the parent or Indian custodian cannot be located.

We also believe that there is a need for specific emergency removal provisions in H.R. 12533. A section should be added allowing the removal of a child from the home without a court order when the physical or emotional well-being of the child is seriously and immediately threatened. That removal should not exceed 72 hours without an order from a court of competent jurisdiction.

Section 102(b) would provide the parent or Indian custodian of an Indian child the right to court-appointed counsel if the court determines that he or she is indigent.

We are opposed to the enactment of this section. We do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.

Section 102(c) would allow all parties to a placement to examine all documents and files upon which any decision with respect to that placement may be based. This provision conflicts with the Federal Child Abuse and Neglect Treatment Act, Public Law 93-247, which provides confidentiality for certain records in child abuse and neglect cases. We believe that such a broad opening of records would lead to less reporting of child abuse and neglect. However, we do recognize the right of the parent to confront and be given an opportunity to refute any evidence which the court may use in deciding the outcome of a child placement proceeding. We recommend that the Indian Child Welfare Act conform with the provisions of Public Law 93-247.

Section 102(e) of H.R. 12533 would require the State court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe that the burden of proof is too high. We would support the language found in section 101(b) of the Senate-passed

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S. 1214, which would impose a burden of clear and convincing evidenc and would set down certain social conditions which could not be considered by the court as prima facie evidence of neglect or abuse. We als believe that the language "will result" in serious damage to the chil should be amended to read "is likely to result" in such damage. It i almost impossible to prove at such a high burden of proof that an ac will definitely happen.

Section 105 of H.R. 12533 would impose on State courts certai preferences in placing an Indian child. Subsection (c) would substitute the preference list of the Indian child's tribe where the trib has established a different order of preference by resolution.

Language should be included in that subsection which woul require that resolution to be published in the Federal Register an later included in the Code of Federal Regulations. This would allo the State court easy access to the preferences of the various tribes.

It is also unclear what the last sentence in subsection (c) means i allowing the preference of the Indian child or parent to be considere "where appropriate". We believe that the preference of the child an the parent should be given due consideration by the court regardless o whether that court is following the preferences set forth in sectio 105(a) or 105(b), or whether it is following a preference list establishe by an Indian tribe. Therefore, we recommend that a separate sub section be added to section 105 stating that the preferences of th Indian child and of the parent be given due consideration by the cour whenever an Indian child is being placed.

Section 106 deals with failed placements and requires that, wheneve an Indian child is removed from a foster home or institution in whic the child was placed for the purpose of further placement, such remov shall be considered a placement for purposes of the act. We see n reason for requiring a full proceeding every time a child is moved fro one form of foster care to another. We do, however, recognize the nee for notification of the parents and the tribe of such move and fo applying the preferences set forth in section 105. Therefore, we recommend that subsection (b) of section 106 be amended to require th notice and preference provisions to apply when a child is moved fro one form of foster care to another and to require the removal to b considered as a new placement only in the case where termination o parental rights is at issue.

Section 107 deals with the right of an Indian who has reached age 1 and who has been the subject of a placement to learn of his or he tribal affiliation. We believe that rather than apply to the court fo such information, the individual involved should apply to the Secretary of the Interior. Under the provisions of title III, the Secretar would maintain a central file with the name and tribal affiliation o each child subject to the provisions of the act. Therefore, the Secretar would be more likely than the State court to have the informatio needed to protect any rights of the individual involved which may flow from his or her tribal affiliation.

Finally, with respect to title I, we believe that a section should b added which would state that the provisions of the act should apply only with respect to placement proceedings which begin 6 month after the date of the enactment of the act. This would allow State some time to familiarize themselves with the provisions of the act an would thus avoid the chance of having large numbers of placements invalidated because of failure to follow the procedures of the act.

Such a section should also state that the intent of the act is not the pre-emption by the Federal Government of the whole area of Indian child welfare and placement. In any case where a state has laws which are more protective than the requirements of this act, e.g., with regard to notice and enforcement, those laws should apply.

We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

We find especially objectionable in title II the following:

> The authorization for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs. We also believe that the amount of any such support would have to be limited to the prevalent State foster care rate for maintenance and medical needs.
>
> The authorization for grants to establish and operate off-reservation Indian child and family service programs.
>
> The new separate authorization of $26 million in section 203(b) of title II.
>
> The provisions of section 201(c) which would authorize every Indian tribe to construct, operate, and maintain family service facilities regardless of the size of the tribe or the availability of existing services and facilities.
>
> The authorization for the use of Federal funds appropriated under title II to be used as the non-Federal matching share in connection with other Federal funds.

However, we believe that the last sentence of section 201(b), providing that licensing or approval by an Indian tribe should be deemed equivalent to that done by a State, should remain in the bill under title I as a separate section.

We have no objection to section 301 of title III of H.R. 12533. We believe that requiring the Secretary to maintain a central file on Indian child placements will better enable the Secretary to carry out his trust responsibility, especially when judgment funds are to be distributed.

However, we object to the provisions of section 302(c), which would require the Secretary to present any proposed revision or amendment of rules and regulations promulgated under that section to both Houses of Congress. Any such proposed revision or amendment would be published in the Federal Register and we believe that placing this additional responsibility on the Secretary is both burdensome and unnecessary.

We believe that section 401 of Title IV should be amended to read as follows:

> Sec. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.
>
> (b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs

of the U.S. House of Representatives within 1 year from the date of this act, a report on the feasibility of providing Indian children with schools located near their homes. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of the House subcommittee's present version of H.R. 12533 would not be consistent with the administration's objectives.

Sincerely,

FORREST J. GERARD,
Assistant Secretary.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 9, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to bring to your attention several areas where the Department of Justice perceives potential problems with S. 1214, a bill to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes. In our view, certain provisions of the bill raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely on race. S. 1214 was passed by the Senate on November 4, 1977 and is now pending in the Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands.

This Department has not been involved in the hearings relating to the bill. Our comments therefore are based on a reading of the text of the bill rather than on a review of the testimony and legislative history which necessarily would be considered by a court which had to interpret its provisions and determine its constitutional validity.

As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S. 1214 is designed to remedy this, and to define the Indian rights in such cases.

The bill would appear to subject family relations matters of certain classes of persons to the jurisdiction of tribal courts which are presently adjudicated in State courts. The bill would accomplish this result with regard to three distinct categories of persons, all possessing the common trait of having enough Indian blood to qualify for membership in a tribe. One class would be members of a tribe. Another class would be nontribal members living on reservations, and a third would be nonmembers living off reservations. These three classes would be

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denied access to State courts for the adjudication of certain family relations matters unless "good cause" is shown under section 102(c) of the bill.

The general constitutional question raised by S. 1214 is whether the denial of access to State courts constitutes invidious racial discrimination violative of the fifth amendment. See *Bowling* v. *Sharp*, 347 U.S. 497 (1954). This question is most properly addressed by focusing on each of the three classes described above and contrasting each class with a similarly situated class of persons whose access to State courts is not affected by the bill.

The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living on or near a reservation. In *Fisher* v. *District Court*, 424 U.S. 382 (1976), the Supreme Court addressed an argument made by members of the Northern Cheyenne Tribe that denial to them of access to the Montana State courts to pursue an adoption did not involve impermissible racial discrimination. In that case, both the persons seeking to pursue adoption of the child in question and the natural mother of the child who contested the right of the Montana courts to entertain the adoption proceeding were residents of the reservation and members of the tribe. The Court stated that:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under Federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari*, 417 U.S. 535, 551–555 (1974). 424 U.S., at 390–91.

In *Fisher*, the class to which the Court was apparently referring consisted of members of the Northern Cheyenne Tribe. This is so because of the Court's citation to *Morton* v. *Mancari*, in which the Court had upheld preferential treatment of Indians in certain employment situations by reasoning that the "preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities * * *." 417 U.S., at 554.

More recently, the Court has reentered this thicket in *United States* v. *Antelope*, 45 U.S.L.W. 4361 (U.S. April 19, 1977). In that case, enrolled Coeur d'Alese Indians contended that their Federal convictions for murder of a non-Indian on the Coeur d'Alese Reservations were products of invidious racial discrimination because a non-Indian participating in the same crime would have been tried in State court and would have had certain substantial advantages regarding the elements required to be proved for conviction.[1] The Court, in rejecting this claim, held that the Coeur d'Alese Indians "were not subjected to Federal criminal jurisdiction [under 18 U.S.C. § 1153] because they are of the Indian race but because they were enrolled members of the Coeur d'Alese Tribe." Id., at 4363.

---

[1] Specifically, the State of Idaho, in which the crime occurred, did not have a felony murder rule so that, in order to be convicted of first-degree murder, the State would have had to prove certain elements that were not required to be proven in the Federal trial because a felony-murder rule was in effect in the latter court.

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We believe that *Mancari*, *Fisher*, and *Antelope* directly support t constitutionality of this bill as it affects the access of tribal membe to State courts. At the same time, these cases do not resolve the co stitutionality of S. 1214 as it would affect the rights of nontrib members living either on or off reservations. Indeed, they can be re to suggest that, absent tribal membership, Congress' freedom treat differently persons having Indian blood is diminished.

With regard to nonmembers living on a reservation, a footnote the *Antelope* case would appear indirectly to address, but not resolv the question presented by this bill:

> "It should be noted, however, that enrollment in an offici tribe has not been held to be an absolute requirement for Fe eral jurisdiction, at least where the Indian defendant lived the reservation and 'maintained tribal relations with the Indian thereon.' *Ex Parte Pero*, 99 F. 2d 28, 30 (CA 7 1938). See al *United States* v. *Ives*, 504 F. 2d 935, 953 (CA 9 1974) (dicta Since respondents are enrolled tribal members, we are not call on to decide whether nonenrolled Indians are subject to [Fe eral criminal jursidiction] and we therefore intimate no views the matter."[2]

In *Ex parte Pero*, *supra*, the seventh circuit affirmed the grant of writ of habeas corpus to a nonenrolled Indian, who had been convict of murder in a State court, holding that the Indian could only be tri in Federal court by virtue of what was then 18 U.S.C. § 548, the pred cessor of 18 U.S.C. § 1153. The court appeared to base its holding the fact that the Indian was the "child of one Indian mother and ha blood father, where both parents are recognized as Indians and mai tain tribal relations, who himself lives on the reservation an maintains tribal relations and is recognized as an Indian * * *." Id at 31.

With regard to nonmembers who are otherwise eligible for trib membership who live on reservations, *Pero* at least stands for t proposition that the federal interest in the "guardian-ward relatio ship" is sufficient to secure to a nonenrolled Indian the protection of Federal criminal proceeding as opposed to tiral by a State court. *Pe* is, however, predicated on a Federal interest which would appear to to differ in kind from the Federal interest identified in *Mance* *Fisher*, and *Antelope*. In those latter cases, the Federal interest promoting Indian self-government was specifically identified as touchstone of the Court's opinions. In our view, this weighty intere is present in S. 1214 in a more attenuated form with regard to nontrib members, even those living on reservations. An eligible Indian who h chosen, for whatever reasons, not to enroll in a tribe would be in position to argue that depriving him of access to the State courts matters related to family life would be invidious. Such an Indi presumably has, under the first amendment, the same right of asso ation as do all citizens, and indeed would appear to be in no differe situation from a non-Indian living on a reservation who, under S. 121 would have access to State courts. The only difference between the would, in fact, be the racial characteristics of the former.

We also think that even *Pero* only marginally supports the co stitutionality of this bill as applied to nonmembers living on reserv

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[2] 45 U.S.L.W., at 4363 n. 7.

. In *Pero*, the focus of the Court's inquiry was on the contacts
een the convicted Indian and the Indian tribe and reservation.
. 1214, the inquiry would appear to be solely directed to contacts
een the Indian child and the Indian tribe, whereas the persons
e rights are most directly affected by the bill are the parents or
dians of the child.[3] Thus, there is little support for the constitu-
lity of this bill as applied to nontribal members living on reserva-
s and the rationale applied by the Court in *Mancari*, *Fisher*, and
lope would not save the bill. The simple fact is that the parents
n Indian child may find their substantive rights altered by virtue
eir Indian blood and the simple fact of residence on a reservation.
Court has never sanctioned such a racial classification which
ed substantive rights, and we are unable to find any persuasive
on to suggest that it would to so.

ur conclusion with regard to nonmembers living on reservations
en more certain in the context of nonmembers living off reserva-
s. In such a situation, we are firmly convinced that the Indian or
ible non-Indian parent may not be invidiously discriminated
nst under the fifth amendment and that the provisions of this
would do so. Assuming a compelling governmental interest would
rwise justify this discrimination, we are unable to suggest what
an interest might be.

or reasons stated above, we consider that part of S. 1214 restrict-
access to State courts to be constitutional as applied to tribal
bers. However, we think that S. 1214 is of doubtful constitution-
as applied to nontribal members living on reservations and would
st certainly be held to be unconstitutional as applied to non-
bers living off reservations.[4]

he Office of Management and Budget has advised that there is no
ction to the submission of this report from the standpoint of the
inistration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 23, 1978.

. MORRIS K. UDALL,
*rman, Committee on Interior and Insular Affairs, House of Repre-
sentatives, Washington, D.C.*

EAR MR. CHAIRMAN: We would like to take this opportunity to
ment on the House Subcommittee on Indian Affairs version of
14, the Indian Child Welfare Act of 1978.

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we understand the bill, this denial of access to State courts would be predicated
e existence of "significant contacts" between the Indian child and an Indian tribe
at this issue would be "an issue of fact to be determined by the court on the basis
h considerations as: Membership in a tribe, family ties within the tribe, prior
ncy on the reservation for appreciable periods of time, reservation domicile, the
nts of the child demonstrating a strong sense of self-identity as an Indian, or any
elements which reflect a continuing tribal relationship."
e bill is unclear as to whether this determination would be made by a tribal court or
court.
e also note our concern with the language used in sections 2 and 3 of the bill regard-
he Federal responsibility for the care of the Indian people" and the "special respon-
ies and legal obligations to American Indian people." The use of such language has
sed by at least one court to hold the Federal Government responsible for the financial
rt of Indians even though Congress had not appropriated any money for such purposes.
v. Califano, et al., Civ. No. 76-3023, USDC, S. Dak. (September 12, 1977). We fear
nguage in this bill could be used by a court to hold the United States liable for the
ial support of Indian families far in excess of the provisions of title II of the bill and
nt of Congress.

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As you know, the Department presented at some length its views on one constitutional issue raised by S. 1214 as it passed the Senate in a letter to you dated February 9, 1978.[1] Briefly, that constitutional issue concerned the fact that S. 1214 would have deprived parents of Indian children as defined by that bill of access to State courts for the adjudication of child custody and related matters based, at bottom, on the racial characteristics of the Indian child. We express in that letter our belief that such racial classification was suspect under the fifth amendment and that we saw no compelling reason which might justify its use in these circumstances. This problem has been, for the most part, eliminated in the subcommittee draft, which defines "Indian child" as "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

We are still concerned, however, that exclusive tribal jurisdiction based on the "(b)" portion of the definition of "Indian child" may constitute racial discrimination. So long as a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding, no constitutional problem arises. Where, however, legal custody of a child who is merely eligible for membership is lodged exclusively with nontribal members, exclusive tribal jurisdiction cannot be justified because no one directly affected by the adjudication is an actual tribal member. We do not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts. This problem could be resolved either by limiting the definition of Indian child to children who are actually tribal members or by modifying the "(b)" portion to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe."

A second constitutional question may be raised by § 101(e) of the House draft. That section could, in our view, be read to require Federal, State, and other courts to give "full faith and credit" to the "public acts, records and judicial proceedings of any Indian tribe applicable to Indian child placements" even though such proceedings might not be "final" under the terms of this bill itself. So read, the provision might well raise constitutional questions under several Supreme Court decisions. *E.g., Halvey* v. *Halvey*, 330 U.S. 610 (1947). We think that problem can be resolved by amending that provision to make clear that the full faith and credit to be given to tribal court orders is no greater than the full faith and credit one State is required to give to the court orders of a sister State.

A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

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[1] The views expressed in that letter were subsequently presented to the Subcommittee on Indian Affairs and Public Lands of your House committee in testimony by this Department on Mar. 9, 1978.

As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that Congress might impose such requirments on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280, we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954).[2]

Finally, we think that section 101(b) of the House draft should be revised to permit any parent or custodian of an Indian child or the child himself, if found competent by the State court, to object to transfer of a placement proceeding to a tribal court. Although the balancing of interests between parents, custodian, Indian children, and tribes is not an easy one, it is our view that the constitutional power of Congress to force any of the persons described above who are not in fact tribal members to have such matters heard before tribal courts is questionable under our analysis of section 102 above and the views discussed above in regard to section 4(4).

II. NONCONSTITUTIONAL PROBLEMS

There are, in addition, a number of drafting deficiencies in the House draft. First, we are concerned about some language used in sections 2 and 3 regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been relied on by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress has not appropriated any money for such purposes. *White* v. *Califano*, 437 F. Supp. 543 (D.S.D. 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the apparent intent of the drafters.

Second, section 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision.

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[2] We note that we are aware of no congressional findings which would indicate the inadequacy of existing State-court procedures utilized in these custody cases, even assuming that such findings would strengthen Congress' hand in this particular matter. As a policy matter, it is clear to us that the views of the States should be solicited before Congress attempted to override State power in this fashion, a position this Department took in testimony before the Senate Select Committee on Indian Affairs on Senate Joint Resolution 102 on Feb. 27, 1978.

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Third, the apparent intent of section 4(10) is, in effect, to reestablish the diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements. We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

The Office of Management and Budget has advised that there is no objection to the presentation of this letter and that enactment of the House Subcommittee on Indian Affairs version of S. 1214 would not be consistent with the administration's objectives.

Sincerely,

Patricia M. Wald,
Assistant Attorney General.

Appendix K

Rules And Regulations For The Indian Child Welfare Act

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

5 CFR Part 13

Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

July 24, 1979.

AGENCY: Bureau of Indian Affairs.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs is adding a new part to its regulations to establish procedures by which an Indian tribe may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1918.

DATE: This rule becomes effective August 30, 1979.

FOR FURTHER INFORMATION CONTACT: David Etheridge, Office of the Solicitor, Division of Indian Affairs, Department of the Inderior, 18th and C Streets, NW., Washington, D.C. 20240; (202) 343–6967.

SUPPLEMENTARY INFORMATION: The authority for issuing these regulations is contained in 25 U.S.C. 1952 and 209 DM 8. This new part was published as proposed rules on April 23, 1979, 44 FR 23992. The comment period on the proposed rules closed on May 23, 1979. Comments were reviewed and considered and changes were made where appropriate.

A. Changes made due to comments received

(1) Section 13.1 has been modified in response to comments urging additional clarification to assure that tribes may reassume jurisdiction without relinquishing their legal arguments that they already had such jurisdiction. One federal district court has ruled that Public Law 83–280 did not deprive tribes of jurisdiction, but merely conferred concurrent jurisdiction on the state. *Confederated Tribes of the Colville Reservation* vs. *Beck*, C–78–76 (E. D. Wash. December 13, 1978). Additionally, disputes continue to exist over whether particular statutes authorizing the sale of certain tribal lands had the effect of transferring to the state jurisdiction over those lands that are sold. *See e.g., United States* vs. *Juvenile*, 453 F. Supp. 1171 (D. S. D. 1978).

(2) Section 13.1 has also been modified to reflect the variety of jurisdictional arrangements authorized by the Indian Child Welfare Act. Where both the tribe and the state currently assert or exercise jurisdiction over the same Indian child custody disputes, the tribe may obtain exclusive jurisdiction. If a state is asserting exclusive jurisdiction, the tribe may take over all jurisdiction or simply obtain jurisdiction concurrent with the state. Additionally, a tribe may reassume partial jurisdiction limited to only certain types of cases. For example, it could take jurisdiction over only a portion of its former reservation area or only over cases referred to it by state courts as authorized under 25 U.S.C. 1918(2).

(3) In response to a comment, specific reference is made to Oklahoma to reflect the intent of Congress, which is clearly stated in the legislative history, that the right to reassume jurisdiction be available to Oklahoma tribes.

(4) A comment that a specific provision be included to authorize groups of tribes to join together so they can pool resources to develop a feasible plan for reassumption of jurisdiction has been adopted as subsection (c). The Act places no restrictions on how tribes organize to assume jurisdiction so long as the final result is a feasible plan. The consortium approach has already been successfully used by tribes in the Northwest and in Nevada. Under such an approach a single court may be designated by several tribes as their tribal court.

(5) In response to a comment, provision has been made for land or communities that acquire reservation status after reassumption of jurisdiction. New subsection (e) states that such land or communities automatically become subject to tribal juriediction unless the petition for reassumption specifically states that it does not apply to lands or communities that subsequently acquire reservation status.

(6) Section 13.11 has been modified to delete requirements for information concerning the reservation when a tribe wishes to assume only referral jurisdiction under 25 U.S.C. 1911(b). Such information is not needed for referral jurisdiction since that jurisdiction is not dependent on residence or domicile on a reservation.

(7) A comment that the phrase "clear and definite" be substituted for the word "legal" in referring to the description of the reservation has been adopted. Commenters objected that some tribes may have difficulty meeting the requirements of preparing a "legal description" of the boundaries. The purpose of this requirement is simply to inform the public and government officials what territory is subject to tribal jurisdiction so that uncertainty over this issue will not delay the resolution of child custody matters by the proper court. A "clear and definite" description of the boundaries will suffice for that purpose.

(8) Several commenters objected to the use of the term "judicial system" because it could be construed to be not as broad as the definition of "tribal court" in 25 U.S.C. 1903(12), which includes any "administrative body of a tribe which is vested with authority over child custody proceedings." The use of the term "adjudicate" was considered objectionable for the same reason. The final rules have been revised in light of these comments by referring to a "tribal court as defined in 25 U.S.C. 1903(12)" rather than a "judicial system" and replacing the phrase "adjudicate child custody disputes" with "exercise jurisdiction over Indian child custody matters."

(9) Some commenters said they thought the phrase "persons with a legitimate interest in a child custody proceeding," which was used to describe those persons who would be able to ascertain from the tribe whether a particular child is a member or eligible for membership, is too vague. Accordingly, that phrase has been changed to "a participant in an Indian child custody proceeding."

(10) One commenter pointed out that some tribes operate without any constitution or other form of governing document. Accordingly, the words "if any" have been added after the phrase "constitution or other governing document."

(11) Comments were also made regarding the requirement that the plan provide information concerning court funding. These objections were based on concern that an impasse might develop in which funding would be contingent on reassumption of jurisdiction and reassumption of jurisdiction contingent on funding. If funds will become available when the tribe reassumes jurisdiction, those funds may be listed in the plan. This provision has been modified to make it clear that such funds may be included. This requirement has been retained because availability of funding to implement the reassumption plan is an essential element of feasibility.

(12) Some commenters also objected to the requirement that the plan state how many tribal members there are and how many Indians live on the affected territory. In part, these objections arise due to difficulty some tribes may have in arriving at precise figures. Accordingly, these provisions have been modified to permit estimates where necessary.

(13) One commenter pointed out that the number residing on a tribe's

reservation is irrelevant if the tribe is petitioning only for referral jurisdiction. Therefore, the requirement for that information, for referral jurisdiction only, has been deleted. The requirement that information be provided concerning the number of persons that will become subject to the tribe's jurisdiction and the number of child custody cases expected, has been retained because it is needed to evaluate whether the plan is adequate. Population is one of the specific factors listed by Congress as appropriate for consideration in making a feasibility determination. See 25 U.S.C. 1918(b)(iii).

(14) Many commenters objected to the requirement for a description of support services that will be available to the tribe or tribes when jurisdiction is reassumed. Some feared that the Bureau would only consider those resources normally employed by traditional social service agencies and would not consider special non-institutional resources available uniquely to the tribe. This provision has been modified to make it clear that such a narrow construction of "support services" is not intended. There was also concern expressed that this provision might effectively preclude poorer tribes from reassuming jurisdiction. The listing of support services may include any services available to the tribe regardless of who funds or operates them. The section has been revised to make this point clearer. States, of course, continue to have the same obligations towards Indians residing within their borders as they have to other citizens under the Fourteenth Amendment to the United States Constitution. Some state services, however, may become less available after reassumption of jurisdiction simply because tribal courts lack the jurisdiction that many state courts have to compel state agencies to provide support services. If reassumption of jurisdiction creates a problem in this regard, the tribal plan should state how the tribe plans to deal with it.

(15) A number of comments were received concerning the requirement in § 13.12 that the affected territory must have been previously subject to tribal jurisdiction. Commenters pointed out that such a requirement would exclude lands and communities that acquired reservation status after passage of legislation giving the state jurisdiction. This subsection has been revised to require only that the land be a reservation as defined in the Act and that it be presently occupied by the tribe.

(16) Paragraph (a)(4) has been modified by using the term "tribal court, as defined in 25 U.S.C. 1903(12)," to assure that tribes have as much freedom as possible in establishing procedures.

(17) One commenter objected to paragraph (a)(5) requiring a tribe to have available support services for *any child* who must be removed from the parents as it imposes a heavy burden on tribes since just one severely handicapped child may require extraordinary assistance, the availability of which the tribe may not be able to establish in advance. This provision has been modified to require only that support services be available for *most children*. Tribes, like states, can make special arrangements when especially difficult cases arise. There will be no requirement for an advance showing that facilities are available for the most severe problems. Also, in response to comments, paragraph (a)(5) has been revised to require only that services be in place by the time of reassumption. They need not be in place before that time.

(18) Paragraph (a)(6) has been modified to require only that a procedure be established for identifying persons who will be subject to the tribe's jurisdiction rather than for identifying all tribal members. The Act contemplates that jurisdiction may be reassumed, if the tribe wishes, only over a portion of the total membership of the tribe. Where the reassumption of jurisdiction is so limited, a procedure is needed only to identify those members or persons eligible for membership who will become subject to tribal jurisdiction.

(19) Upon the recommendation of one commenter, a new subsection (b) has been added specifically providing for assistance by the Department to a tribe that may wish to reassume partial jurisdiction if it is unable to develop a feasible plan for total reassumption of jurisdiction. The subsection also provides for Departmental assistance in negotiating agreements with the state under 25 U.S.C. 1919.

(20) In response to comments on § 13.14(b) copies of the notice of reassumption of jurisdiction will be sent to the governor and the highest court in the state as well as the attorney general of the affected state or states to improve the likelihood that all affected state agencies are informed of the change in jurisdiction.

(21) In response to comments on § 13.15 responsibility for the initial decision has been shifted from the Secretary to the Assistant Secretary—Indian Affairs. This change has been made to provide for an administrative appeal before a decision is made that is final for the Department and reviewable in the federal court.

B. Changes not adopted

(1) Some commenters objected to requiring the citation of the statute or statutes which have provided the basis for state assertion of jurisdiction. The objection is based on concern that citation of such a statute might be construed as an admission that state assertion of jurisdiction was legally authorized. The language of this requirement has been modified to make it more clear that it is the state—not necessarily the tribe—which asserts that a particular statute granted the state jurisdiction. This requirement has been retained because it is good legislative practice to know what statutes may be affected when taking action that may result in their effective repeal.

(2) One commenter recommended language to the effect that these regulations establish the right of tribes to reassume jurisdiction. This recommendation has not been adopted because it is the statute—not these regulations—which establishes that right. The regulations merely provide a procedure by which a tribe can exercise the right established in the statute.

(3) A comment recommending use of the term "assertion of exclusive jurisdiction" instead of "reassumption of jurisdiction" has not been adopted. "Reassumption of jurisdiction" is the term used by the Act and it would be unnecessarily confusing to use a different term in the regulations. The concern of the commenter that the term "reassumption" might implicitly concede that the reservation of a petitioning tribe has ever been subject to exclusive state jurisdiction is effectively answered by the explicit language of the section. A tribe need not admit that a state actually has jurisdiction. A petition may be filed if a state has been asserting jurisdiction, regardless of whether such assertion is valid.

(4) A comment that the regulations provide that tribes may regain jurisdiction lost because of a federal adjudication has not been adopted. Section 108 of the Act authorizes reassumption only when jurisdiction has been conferred on a state pursuant to a law. Strictly speaking, jurisdiction is not conferred on a state through court decisions. The decisions simply conclude that a certain law has caused a transfer in jurisdiction.

(5) A comment that reassumption include jurisdiction over child welfare services and investigative and preventive interventions in the homes of Indian children has also not been

adopted. The Act only authorizes reassumption over child custody proceedings. It is not the intent of the Act to exclude anyone from providing services to Indian families. It is only when such services may involve placing the child with someone other than his or her parents or Indian custodian that the Act becomes involved. Where jurisdiction is reassumed, social service agencies must comply with the requirements of a tribal court—not a state court—when placing a child.

(6) One commenter objected generally to the amount of information requested on the ground that it discriminates against tribes that have been subjected to state jurisdiction since those tribes already exercising jurisdiction are not required to provide similar information. Most of the information requirements have been retained because such "discrimination" is mandated by the statute. Under 25 U.S.C. 1918 those tribes that wish to reassume jurisdiction are required to submit a "suitable plan to exercise such jurisdiction" and the Secretary is to determine the "feasibility" of the plan. Congress has imposed no similar requirements on tribes already exercising Indian child custody jurisdiction.

(7) One commenter asked that the regulations be more specific as to which entity is the "governing body" of a tribe. The regulations cannot be more specific because the internal organization differs from tribe to tribe.

(8) One commenter objected to the requirement that the tribe establish a procedure for determining who is a member of a tribe on the grounds that it is the obligation of the parties and the court to make that determination. This recommendation has not been adopted. A method of determining membership was one of the items specifically listed in 25 U.S.C. 1918(b) as a factor the Secretary may consider in determining the feasibility of a plan. It is true that the legal burden for determining whether the Act applies to a particular child is on the parties and the court. This provision does not change that burden. It merely asks that the tribe have a procedure for cooperating with the court or the parties in meeting their burden. Since the tribe is in the best position to know who its own members are, it seems reasonable to ask it to cooperate in that respect. Because of the special needs of children, promptness and certainty are more important in child custody proceedings than they are in most other litigation. Tribal cooperation in this respect will help assure that its members receive the benefits of the Act and will impose only a minimal burden on the tribe.

(9) Some commenters recommended that the Bureau accept without question a tribal governing body's conclusion that the tribe has authorized it to exercise jurisdiction over Indian child custody matters. Under 25 U.S.C. 1918, the Secretary is to determine whether the exercise of jurisdiction is feasible. The exercise of such jurisdiction by an entity that has not been authorized by the tribe to exercise it is clearly not feasible. It has been a longstanding general principle on the part of the Department of the Interior that the Indian tribes are empowered to interpret their own governing documents. Consequently, when this Department is called upon to decide an issue that requires the interpretation of tribal governing documents, it will give great weight to any interpretation of those documents made by an appropriate tribal forum. However, the Department is not necessarily bound thereby. The Secretary cannot accept or acquiesce to a tribal interpretation which is so arbitrary or unreasonable that its application would constitute a violation of the right to due process. *See* Letter decision of Forrest J. Gerard, Assistant Secretary for Indian Affairs, dated August 28, 1978, 5 Indian Law Reporter H-17, 18 (1978). Exercise of jurisdiction by an entity not authorized to exercise it would constitute a violation of the right to due process. Accordingly, the requirement of a citation to the provision in the tribal constitution or other governing document, if any, that authorizes the governing body to exercise jurisdiction over Indian child custody matters has been retained so the Department will have the information it needs in order to make the determination of feasibility. The tribal governing body's conclusion on that point will be given great weight and will be upheld if its interpretation is not arbitrary or unreasonable. If the tribal electorate wishes its governing body to exercise such authority despite the Department's conclusion that its constitution or governing document does not authorize the governing body to do so, the constitution or governing document can be amended. Non-tribal courts are sometimes called upon to interpret tribal laws. *See e.g., Quechan Tribe of Indians* vs. *Rowe,* 531 F. 2d 408 (9th Cir. 1976); *Confederated Tribes of the Colville Indian Reservation* vs. *Washington,* 591 F. 2d 89 (9th Cir. 1979). Clarification of the governing body's authority prior to reassumption of jurisdiction will avoid delays later on when the custody of specific Indian children is being decided by the court.

(10) Some commenters also objected to requesting a copy of any tribal ordinances or court rules establishing procedures for exercising child custody jurisdiction. Exercise of jurisdiction by a tribe that has not thought through how it is going to handle the cases that come to it cannot be said to be feasible. The most basic element of due process is the existence of a procedure on which the parties to a dispute can rely as the basis for their rights. Accordingly this requirement has been retained.

(11) A number of commenters objected to the requirement that the tribal court that is established be capable of deciding child custody matters in a manner that meets the requirements of the Indian Civil Rights Act. One commenter argued that after the Supreme Court's decision in *Santa Clara Pueblo* vs. *Martinez,* 436 U.S. 49 (1978), the question of how the Indian Civil Rights Act applies to tribal government activities should be left exclusively to the tribe. In footnote 22 the Court in *Martinez* specifically noted that it may be appropriate to consider Indian Civil Rights Act issues when the Department exercises its approval authority. This Department will not exercise its approval power in a manner that authorizes violations of civil rights. A plan that does not provide for exercise of jurisdiction in a manner that protects rights guaranteed under the Indian Civil Rights Act is not a feasible plan as required by the Indian Child Welfare Act.

(12) One commenter recommended that a tribe only be required to show that it is able to establish the necessary support services. This recommendation has not been adopted. Services should be available at least by the time reassumption occurs. Such services need not be organized in the same fashion as services from traditional social services agencies. Such services need not be funded or controlled by the tribe. All that is necessary is that they be available.

(13) One commenter recommended that reassumption of jurisdiction not be approved unless the tribe could show that it is in "the best interests of children" that jurisdiction would be reassumed. Such a standard is not authorized by the Act. The Act only requires that tribal jurisdiction be "feasible"—not that it necessarily be shown to be better for the children than state jurisdiction. Although the findings in the Act indicate that Congress believes tribal jurisdiction will, in most cases, be better for Indian children, it

did not require that each tribe reassuming jurisdiction prove that point. States are not denied jurisdiction over child custody matters relating to their residents simply because a neighboring state could handle the cases better. Tribes should not be required to compete with neighboring jurisdictions any more than states are.

(14) A recommendation that paragraph (a)(4) be modified to define in precise terms what is meant by "the requirements of the Indian Civil Rights Act" has not been adopted because it would be virtually impossible to do so in sufficiently complete fashion. The most important requirement of that Act in this context is the due process provision, which requires that disputes be handled in a manner that is fair. An effort to define "fairness" in detail would tend to unnecessarily restrict tribal options. The Department will look for guidance on that issue to the existing body of caselaw defining what "due process" or "fairness" means in specific situations.

(15) One commenter objected to the requirement in § 13.14 for Federal Register publication of the fact that a petition has been received prior to taking action on the petition. The commenter argued that publication would place on tribes an undue burden of having to respond to adverse comments on their petitions. The purpose of publication is not to solicit comments but to give the public and affected officials and agencies some advance notice that a change in jurisdiction may be coming. Although comments will not be solicited, any that are volunteered will be considered and made available to the petitioning tribe or tribes. The primary author of this document is David Etheridge, Office of the Solicitor, Department of the Interior; (202) 343-6067.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Subchapter B, Chapter 1, of title 25 of the Code of Federal Regulations is amended by adding a new Part 13, reading as follows:

PART 13—TRIBAL REASSUMPTION OF JURISDICTION OVER CHILD CUSTODY PROCEEDINGS

Subpart A—Purpose

Sec.
13.1 Purpose.

Subpart B—Reassumption

13.11 Contents of reassumption petitions.
13.12 Criteria for approval of reassumption petitions.
13.13 Technical assistance prior to petitioning.
13.14 Secretarial review procedure.
13.15 Administrative appeals.
13.16 Technical assistance after disapproval.

Authority: 25 U.S.C. 1952.

Subpart A—Purpose

§ 13.1 Purpose.

(a) The regulations of this part establish the procedures by which an Indian tribe that occupies a reservation as defined in 25 U.S.C. § 1903(10) over which a state asserts any jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588) Pub. L. 83–280, or pursuant to any other federal law (including any special federal law applicable only to a tribe or tribes in Oklahoma), may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. § 1918.

(b) On some reservations there are disputes concerning whether certain federal statutes have subjected Indian child custody proceedings to state jurisdiction or whether any such jurisdiction conferred on a state is exclusive of tribal jurisdiction. Tribes located on those reservations may wish to exercise exclusive jurisdiction or other jurisdiction currently exercised by the state without the necessity of engaging in protracted litigation. The procedures in this part also permit such tribes to secure unquestioned exclusive, concurrent or partial jurisdiction over Indian child custody matters without relinquishing their claim that no federal statute had ever deprived them of that jurisdiction.

(c) Some tribes may wish to join together in a consortium to establish a single entity that will exercise jurisdiction over all their members located on the reservations of tribes participating in the consortium. These regulations also provide a procedure by which tribes may reassume jurisdiction through such a consortium.

(d) These regulations also provide for limited reassumptions including jurisdiction restricted to cases transferred from state courts under 25 U.S.C. § 1911(b) and jurisdiction over limited geographical areas.

(e) Unless the petition for reassumption specifically states otherwise, where a tribe reassumes jurisdiction over the reservation it occupies, any land or community occupied by that tribe which subsequently acquires the status of reservation as defined in 25 U.S.C. § 1903(10) also becomes subject to tribal jurisdiction over Indian child custody matters.

Subpart B—Reassumption

§ 13.11 Contents of reassumption petitions.

(a) Each petition to reassume jurisdiction over Indian child custody proceedings and the accompanying plan shall contain, where available, the following information in sufficient detail to permit the Secretary to determine whether reassumption is feasible:

(1) Full name, address and telephone number of the petitioning tribe or tribes.

(2) A resolution by the tribal governing body supporting the petition and plan. If the territory involved is occupied by more than one tribe and jurisdiction is to be reassumed over all Indians residing in the territory, the governing body of each tribe involved must adopt such a resolution. A tribe that shares territory with another tribe or tribes may reassume jurisdiction only over its own members without obtaining the consent of the other tribe or tribes. Where a group of tribes form a consortium to reassume jurisdiction, the governing body of each participating tribe must submit a resolution.

(3) The proposed date on which jurisdiction would be reassumed.

(4) Estimated total number of members in the petitioning tribe or tribes, together with an explanation of how the number was estimated.

(5) Current criteria for membership in the tribe or tribes.

(6) Explanation of procedure by which a participant in an Indian child custody proceeding may determine whether a particular individual is a member of a petitioning tribe.

(7) Citation to provision in tribal constitution or similar governing document, if any, that authorizes the tribal governing body to exercise jurisdiction over Indian child custody matters.

(8) Description of the tribal court as defined in 25 U.S.C. § 1903(12) that has been or will be established to exercise jurisdiction over Indian child custody matters. The description shall include an organization chart and budget for the court. The source and amount of non-tribal funds that will be used to fund the court shall be identified. Funds that will become available only when the tribe reassumes jurisdiction may be included.

(9) Copy of any tribal ordinances or tribal court rules establishing procedures or rules for the exercise of jurisdiction over child custody matters.

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(10) Description of child and family support services that will be available to the tribe or tribes when jurisdiction reassumed. Such services include any resource to maintain family stability or provide support for an Indian child in the absence of a family—regardless of whether or not they are the type of services traditionally employed by social services agencies. The description shall include not only those resources of the tribe itself, but also any state or federal resources that will continue to be available after reassumption of jurisdiction.

(11) Estimate of the number of child custody cases expected during a year together with an explanation of how the number was estimated.

(12) Copy of any tribal agreements with states, other tribes or non-Indian local governments relating to child custody matters.

(b) If the petition is for jurisdiction other than transferral jurisdiction under 25 U.S.C. 1911(b), the following information shall also be included in the petition and plan:

(1) Citation of the statute or statutes upon which the state has based its assertion of jurisdiction over Indian child custody matters.

(2) Clear and definite description of the territory over which jurisdiction will be reassumed together with a statement of the size of the territory in square miles.

(3) If a statute upon which the state bases its assertion of jurisdiction is a surplus land statute, a clear and definite description of the reservation boundaries that will be reestablished for purposes of the Indian Child Welfare Act.

(4) Estimated total number of Indian children residing in the affected territory together with an explanation of how the number was estimated.

§ 13.12 Criteria for approval of reassumption petitions.

(a) The Assistant Secretary—Indian Affairs shall approve a tribal petition to reassume jurisdiction over Indian child custody matters if:

(1) Any reservation, as defined in 25 U.S.C. 1903(10), presently affected by the petition is presently occupied by the petitioning tribe or tribes;

(2) The constitution or other governing document, if any, of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters;

(3) The information and documents required by § 13.11 of this part have been provided;

(4) A tribal court, as defined in 25 U.S.C. 1903(12), has been established or will be established before reassumption and that tribal court will be able to exercise jurisdiction over Indian child custody matters in a manner that meets the requirements of the Indian Civil Rights Act, 25 U.S.C. 1302;

(5) Child care services sufficient to meet the needs of most children the tribal court finds must be removed from parental custody are available or will be available at the time of reassumption of jurisdiction; and

(6) The tribe or tribes have established a procedure for clearly identifying persons who will be subject to the jurisdiction of the tribe or tribes upon reassumption of jurisdiction.

(b) If the technical assistance provided by the Bureau to the tribe to correct any deficiency which the Assistant Secretary—Indian Affairs has identified as a basis for disapproving a petition for reassumption of exclusive jurisdiction has proved unsuccessful in eliminating entirely such problem, the Bureau, at the request of the tribe, shall assist the tribe to assert whatever partial jurisdiction as provided in 25 U.S.C. 1918(b) that is feasible and desired by the tribe. In the alternative, the Bureau, if requested by the concerned tribe, shall assist the tribe to enter into agreements with a state or states regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, including agreements which may provide for the orderly transfer of jurisdiction to the tribe on a case-by-case basis or agreements which provide for concurrent jurisdiction between the state and the Indian tribe.

§ 13.13 Technical assistance prior to petitioning.

(a) Upon the request of a tribe desiring to reassume jurisdiction over Indian child custody matters, Bureau agency and Area Offices shall provide technical assistance and make available any pertinent documents, records, maps or reports in the Bureau's possession to enable the tribe to meet the requirements for Secretarial approval of the petition.

(b) Upon the request of such a tribe, to the extent funds are available, the Bureau may provide funding under the procedures established under 25 CFR 23.22 to assist the tribe in developing the tribal court and child care services that will be needed when jurisdiction is reassumed.

§ 13.14 Secretarial review procedure.

(a) Upon receipt of the petition, the Assistant Secretary—Indian Affairs shall cause to be published in the Federal Register a notice stating that the petition has been received and is under review and that it may be inspected and copied at the Bureau agency office that serves the petitioning tribe or tribes.

(1) No final action shall be taken until 45 days after the petition has been received.

(2) Notice that a petition has been disapproved shall be published in the Federal Register no later than 75 days after the petition has been received.

(3) Notice that a petition has been approved shall be published on a date requested by the petitioning tribe or within 75 days after the petition has been received—whichever is later.

(b) Notice of approval shall include a clear and definite description of the territory presently subject to the reassumption of jurisdiction and shall state the date on which the reassumption becomes effective. A copy of the notice shall immediately be sent to the petitioning tribe and to the attorney general, governor and highest court of the affected state or states.

(c) Reasons for disapproval of a petition shall be sent immediately to the petitioning tribe or tribes.

(d) When a petition has been disapproved a tribe or tribes may repetition after taking action to overcome the deficiencies of the first petition.

§ 13.15 Administrative appeals.

The decision of the Assistant Secretary—Indian Affairs may be appealed under procedures established in 43 CFR 4.350–4.369.

§ 13.16 Technical assistance after disapproval.

If a petition is disapproved, the Bureau shall immediately offer technical assistance to the tribal governing body for the purpose of overcoming the defect in the petition or plan that resulted in the disapproval.

Forrest J. Gerard,

Assistant Secretary—Indian Affairs.

[FR Doc. 79-23480 Filed 7-30-79; 8:45 am]

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25 CFR Part 23

Indian Child Welfare Act; Implementation

July 24, 1979.

AGENCY: Bureau of Indian Affairs, Department of the Interior.

ACTION: Final rule.

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SUMMARY: The Bureau of Indian Affairs hereby adds a new part to its regulations to implement the provisions of the Indian Child Welfare Act of 1978 (Pub. L. 95-608). The Indian Child Welfare Act seeks to protect the best interest of Indian children by promoting the stability and security of Indian families and tribes by preventing the unwarranted and arbitrary removal of Indian children from their Indian homes; establishing procedures for transferring Indian child custody proceedings from state courts to the appropriate tribal courts; setting forth criteria for placement of children voluntarily or involuntarily removed from their parents, guardians, or custodians; providing a system of intervention in state court proceedings by the child's parents, relatives or the child's tribe in involuntary removal and adoption matters of Indian children, and providing grants to Indian tribes and organizations on or "near" reservations or off-reservations to plan, establish, operate and manage child placement and family service programs to carry out the intent of the Act. It is intended that these regulations will complement those related procedures published in 25 CFR 13, "Tribal Reassumption of Jurisdiction Over Child Custody Proceedings," and will also complement "Guidelines for State Courts" relative to Indian child custody proceedings to be published as a Federal Register Notice.

EFFECTIVE DATE: These new regulations will become effective August 30, 1979.

FOR FURTHER INFORMATION CONTACT: Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, D.C. 20245 (703-235-2758).

SUPPLEMENTARY INFORMATION: On April 23, 1979 there were published in the Federal Register (44 FR 23993) proposed regulations for the Indian Child Welfare Act. Interested persons were given 30 days in which to submit written comments regarding the proposed regulations. Thorough and careful consideration was given to all comments received during this period. Many comments were subsequently adopted but certain others were not.

The function of regulations is to provide rules that the issuing agency will follow in carrying out the responsibilities assigned to it by an Act of Congress. Under the Indian Child Welfare Act, responsibility for the conduct of most aspects of Indian child custody proceedings remains with state and tribal courts. Where the responsibility lies with the state or the tribe, it is the state or tribe that has both the authority and the responsibility to establish rules or procedures to carry out those responsibilities.

The simple fact that a statute deals with Indians does not authorize this Department to promulgate rules governing all aspects of its implementation. For example, 25 U.S.C. 194 governs the burden of proof in certain cases involving Indians, but does not authorize the Department to regulate the courts in such cases. An agency may not promulgate binding rules if the ultimate power to determine the content of the law covered by the rules is in the courts. *See generally,* Davis, *Administrative Law Treatise* § 5.03 (1958). By leaving with courts the jurisdiction to decide Indian child custody matters, Congress left to those courts the responsibility of determining how the Act applies to the cases before them.

Some portions of the Act do assign the Interior Department certain responsibilities related to child custody proceedings. For example, the Department is to pay for appointed counsel in some cases, and is to be notified of child custody proceedings in certain instances. Regulations implementing those Departmental responsibilities can and do have some impact on court procedures.

Some commenters objected to publication of the guidelines for state courts as a notice rather than as a proposed rule. They fear that the guidelines will be invalidated by a court for failure to follow the rule-making procedures of the Administrative Procedures Act. The guidelines by themselves are not intended to have the force of law; consequently, no court should have occasion to rule on their validity. The guidelines will have the force of law only as they are adopted by individual states as legislation, regulations, or court rules. So long as proper state procedures are followed in adopting them, they will not be subject to challenge on procedural grounds.

A number of commenters apparently assume that all language in the statute must be repeated in the regulations if it is to have the force of law. The statute is fully effective without reference to the regulations. The purpose of the regulations is merely to provide rules for the Department to follow in carrying out its responsibilities under the Act. Statutory language is included at some points in the regulations to explain the context of the rules and to reduce the need to refer to the statute in order to understand the regulations. Repeating or omitting statutory language in the regulations has no effect on the validity of that statutory language.

A number of commenters also recommended that the regulations "correct" what they regarded as loopholes, mistakes, or bad policy contained in the statute. This Department does not have the authority to "correct" alleged mistakes of Congress through regulations. Where statutory language is either vague or ambiguous and an interpretation of that language is necessary for this Department to carry out its responsibilities, regulations may properly provide such an interpretation. Such interpretations, however, cannot be contrary to the plain meaning of the Act itself.

A. Changes Made Due to Comments Received

(1) Section 23.2(b)(5) is revised to read "a crime in the jurisdiction where the act occurred."

This additional language has been added to clarify that an offense allegedly committed by a child must be a crime if committed by an adult at the same place in order to exempt a child custody proceeding from the provisions of the Act. A new sentence has also been added stating that "status offenses" such as truancy and incorrigibility (which are not crimes adults can commit) are covered by the Act. This sentence simply states in positive terms the legal effect of the Act in excluding from coverage under the Act only those offenses which an adult can commit.

(2) Section 23.2(d) is revised to include subtitles after each subsection in order to highlight the variances in definitions. These subtitles are: (1) Jurisdictional Purposes; (2) Service Eligibility for Children and Family Service Programs On or Near Reservations; and (3) Service Eligibility for Off Reservation Children and Family Service Programs. In part (2) the Secretary of Health, Education, and Welfare is delineated for further clarification. An additional sentence is included to explain that tribal membership is based on tribal law, ordinance, or custom.

(3) Section 23.2(f), a cross reference to the "guidelines for State Courts" is made for further clarification.

(4) Section 23.2(g), an (s) is added to person to refer to the situation where more than one person is the custodian.

(5) Section 23.2(k), the definition of reservation is added as written in the Act for the purpose of clarification. Reference is frequently made to "the reservation," therefore the inclusion of

this definition in the regulations is necessary.

(6) Section 23.2(l), a definition of "state court" is added for clarification because of the frequent reference to this term.

The definition includes the District of Columbia and any territory or possession of the United States because this Department believes that definition to be consistent with the intent of Congress. Whether the term "state" includes the District of Columbia, territories and possessions depends on the purposes of Congress in enacting the specific legislation and the circumstances under which the words were employed. See e.g., *Examining Board* vs. *Flores de Otero*, 426, U.S. 572 (1976). In 25 U.S.C. 1902 Congress stated that its intent in passing the Indian Child Welfare Act was to establish minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. In 25 U.S.C. 1901(4) Congress expressed its concern over the alarmingly high percentage of Indian families broken up by the removal of their children by non-tribal public and private agencies. The District of Columbia, U.S. possessions and territories also have non-tribal public agencies that place children within their jurisdiction. It seems unlikely that Congress intended to exclude any non-tribal government from the minimum federal standards.

The definition also includes government agencies authorized by law to make any placements covered by the Act regardless of whether they are called courts. This definition parallels the statutory definition of tribal court. 25 U.S.C. 1903(12).

(7) Section 23.2 (m) and (n) are renumbered due to the addition of the two previous definitions.

(8) Section 23.3 Policy. "preventative measures" is changed to "measures to prevent the breakup of Indian families" for the purposes of clarification.

(9) The addresses for sending notice to the Secretary are listed in § 23.11(b). The contents of the notice to the Secretary are set out in § 23.11(c). Additional information concerning rights under the Act that the Bureau will include in its notice to the tribes, parents and Indian custodians is listed in § 23.11(d). In response to a comment, this subsection also provides for asking tribal officials to handle in a confidential manner the information they receive concerning individual cases.

(10) Section 23.11(d). Notice may also given by "personal service." This type of service is included to give an alternative form of service or "higher standard of protection to the rights of the parent," custodian or tribe as authorized in Section 111 of the Act.

(11) Several commenters expressed concern that the proposed rules in Section 23.11 could be construed as authorizing BIA officials to halt their efforts to identify a child's tribe or to locate the child's parents or Indian custodians after only 15 days of effort. The deadline was included in the proposed regulations to assure prompt action by Bureau officials. Prompt action is needed since the court is free to begin its proceedings only 10 days after notice to the Secretary. Even if the court is willing to continue the case pending Bureau action, a long delay could be prejudicial to the child and other parties to the proceedings. There may be many instances, however, in which 15 days is simply not enough time to complete the search.

Two changes have been made in the regulations to resolve this problem. First, the Bureau is to attempt to complete the search and give notice within 10 days in order to conform with Section 102 of the Act, and so that those who are notified will be able to participate in a timely manner in the proceedings. Second, if the Bureau has not been able to complete its efforts in that time, it is to inform the court of that fact and let the court know how much more time will be needed. The court can then use that information to decide whether the proceedings should be further delayed. Regardless of what action the court takes, the BIA will complete its search efforts.

(12) One commenter suggested that the time problem could be alleviated to some extent if the BIA would be willing to undertake searches before a case is actually filed when asked to do so by someone who is contemplating filing such an action. This suggestion has been adopted in § 23.11(f).

(13) In Section 23.11(e) the terminology "has a relationship with an Indian tribe" is changed to "meets the criteria of an Indian child as defined in section (4) of the Act" for further clarification and to relate back to the legislative language.

(14) Section 23.12 is changed to enable any tribe to designate by resolution "or by such form as the tribal constitution or current practice requires" an agent for service of notice.

This change expands the methods by which an agent for notice may be designated. Some tribes do not issue resolutions, but grant authority for action by other methods.

(15) In Section 23.12 the sentence, "The Secretary shall publish the name and address of the designated agent for service of notice in the Federal Register," is changed by adding the following, "on an annual basis." A current listing of such agents will be maintained by the Secretary, and will be available through the Area Offices. These changes are made to more adequately handle the requests for information regarding agents for service, many of whom could change on a frequent basis.

(16) Section 23.21 is changed to delete the word "non-profit" from grant eligibility criteria. Profit-making Indian organizations otherwise eligible for grants under this part may apply for said grants for non-profit-making programs. Comments suggested that there are several Indian organizations which have both profit and non-profit component programs. Section 23.21 is also changed to make clear that applicants may apply for a grant individually or as a consortium.

(17) Section 23.22 is changed to make clear that the examples of Indian child and family service programs provided therein are, in fact, just examples and do not limit or restrict the kinds of child and family service programs for which grants may be provided. Some renumbering of subsections is also done to make the overall section more readable.

(18) Section 23.25(a) is changed to recognize that statistical and other precise quantitative data are not always available to evaluate the need for Indian child and family service programs. Such data may henceforth be considered only insofar as practicable and may include estimated data as well as actual data. Section 23.25(a) is also changed to ensure that quality and relevance of service to Indian clientele be considered when determining Indian accessibility to existing child and family service programs.

(19) Section 23.25(b) is changed to emphasize that the governing body of a tribe may subgrant or subcontract its grant to an Indian organization if it desires to do so.

(20) Section 23.25(c) is changed to give preference for selection for off-reservation grants to off-reservation Indian organizations showing substantial rather than majority support from the community to be served. Section 23.25(c) is also changed to waive the substantial community support requirement for certain existing Indian organizations.

(21) Section 23.27(c)(1) is changed to delete reference to distribution of grant

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funds based upon ratio of number of Indian children under age 18 to be ved under a proposal to number of Indian children under 18 nationally.

(22) Section 23.35(a). To facilitate administration of grants pursuant to 23.27(a), a change was made transferring the administration of grants from the Central Office to the Area Office level.

(23) Section 23.43(a) is changed to specifically reference funds under Titles IVB and XX of the Social Security Act as appropriate matching shares for grant funds provided under this part, because they were specifically referenced in the Act.

(24) Section 23.43(b) is changed to (c), and a new (b) is added to reference agreements between the Department of the Interior and the Department of Health, Education, and Welfare for use of funds under this part.

(25) Section 23.43(b) was added to emphasize section 203(a) of the Act. That section was not addressed in the proposed regulations.

(26) Many recommendations were received concerning design of a funding formula to ensure that all approved grant applicants receive a proportionately equitable share of funds and that small tribes and Indian organizations do not lose out to large tribes and Indian organizations when funds are distributed. These recommendations will be utilized insofar as possible in the formula design. The formula itself will be published at a later date as a Federal Register Notice.

(27) In Section 23.81(a), the address for transmittal of information to the Secretary shall be sent to the Chief Justice of the highest court of Appeal, "the Attorney General, and Governor" of each state. The Governor was added to insure wider distribution of this material among state agencies.

(28) Section 23.81(a)(1) is changed to "Name of the child, the tribal affiliation, and the quantum of Indian blood," to secure more information for the adult Indian individual who is adopted.

(29) Section 23.81(b), or, is inserted between "adoptive or foster parents" who may request information for an adopted Indian individual to correct an error, and comply with the language of the Act.

(30) Section 23.81(b), additional wording has been added to clarify what information will be disclosed for enrollment purposes, for determining rights or benefits and to whom it may be released. These limitations were added to stress not only the confidential nature of this information, but also the importance of enrollment.

(31) Sections 23.91, 23.92, and 23.93 were added to assist the tribes and courts in carrying out the purposes of the Act.

B. Changes Not Adopted

Certain other comments were received and duly considered, but have not been incorporated into the regulations. The following suggested changes were not adopted for the reasons given:

(1) A number of very forceful comments were received to the effect that the Bureau of Indian Affairs had disclaimed its responsibility insofar as would apply to proceedings in the state courts by publishing proposed "Guidelines for State Courts" rather than proposed regulations in Part 23. As many comments indicated, it was initially administratively planned to write the guidelines as regulations. Also, as a result of the public hearings, the National Congress of American Indians and the National Indian Court Judges Association proposed these guidelines as regulations. It is not administrative policy, but rather the strong legal position of the Office of the Solicitor, Department of the Interior, that the material be published as "Guidelines for State Courts." The Office of the Solicitor's legal position is set out at the beginning of this "Supplementary Information" section. Therefore, the "Guidelines for State Courts" are not included as regulations in Part 23 but will be published as a Federal Register Notice.

(2) Section 23.2. Comments were received in each of the following instances regarding the language employed in certain of the definitions of this section:

a (b) The phrase "child custody proceeding" was objected to as being too restrictive and as not encompassing juvenile delinquency proceedings:

b (b)(1) "Foster care placement" as defined was viewed as being too narrow in scope, and as not relating to institutional placements, voluntary placements, and to special circumstances which might be imposed as a result of divorce proceedings.

One commenter recommended that Section 23.2(b)(5) be changed to reflect the statement in the Senate Report on the Act at Page 16 that the definition of child placement includes "juveniles charged with minor misdemeanant behavior who would be covered by prohibitions against incarceration in secure facilities by the Juvenile Justice and Delinquency Prevention Act of 1974." The General Counsel's Office of the Law Enforcement Assistance Administration, however, has informed this Department that incarceration of juveniles charged with minor misdemeanors is permitted under that Act. For that reason, the definition has not been modified to include placements based on such offenses.

c (d) A respondent requested revision in this subsection to expand the definition of "Indian" to include non-Indian children of Indian parents;

d (d & e) Comment called for a more clearly-drawn division between the definitions of "Indian" and "Indian child." (A numbering and a title change were made, with no change being made in content;)

e (*f*) It was suggested that the proposed definition of "Indian child's tribe" should be reworded so as to deal more explicitly with those cases in which an Indian child is eligible for membership in more than one tribe. Further comment asked that this definition be expanded to make direct reference to Alaska Natives.

f (g) It was suggested that the definition of the term "Indian custodian" be expanded to include Indian social services agencies;

g (g) Usage of the term "transferred" was objected to;

h (i) Request was made that an expansion of the definition of "Indian tribe" be made to include Canadian tribes;

The language was not changed in any of the foregoing definitions because each of the definitions was taken directly from the Act. It cannot be the function of regulations to expand upon or to subtract from legislation as enacted by the Congress.

i (j) One commenter expressed doubt concerning the constitutionality of the definition of "parent" in both the regulations and the statute based on the recent Supreme Court decision in *Caban* vs. *Mohammed*, 47 U.S.L.W. 4462 (April 24, 1979). The court in that case held unconstitutional a statute permitting an unwed mother, but not an unwed father, to block an adoption by denying consent. Unlike the statute involved in that case, however, the Indian Child Welfare Act does not require a father to be married to have all the rights of a parent. The father need merely acknowledge paternity. This requirement imposes even less of a burden on the father than the "legitimation" requirement imposed by another statute that was upheld by the Supreme Court the same day it decided *Caban; Parham* vs. *Hughes*, 47 U.S.L.W. 4457 (April 24, 1979). Unlike marriage, neither legitimation nor acknowledgement requires the consent of the mother. The reason such a requirement is permissible is well expressed in Justice Powell's concurring opinion in *Parham*: "The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity." *Id.* at 4480.

(3) Two comments were received which requested that a definition for "tribal law or custom" be included in the regulations. Such a definition was written into the proposed guidelines, and it was deemed more appropriate for it to remain therein.

(4) Comments were received asking for definitions of "domicile" and "residence." Ultimate definition of the terminology in question must be in accordance with case law.

(5) Comment was received regarding the proposed definition of the term "parent" relative to its application to the unwed father and the minor unwed parent. No changes were made because (a) the existing definition is not in conflict with the Supreme Court decision rendered in the *Stanley* vs. *Illinois*, 405 U.S. 645 (1972) decision, and (b) the minority of an individual does not affect her or his relationship as a parent.

(6) One comment asserted that there was a need to define the standards of evidence addressed in Section 102 (e and f) of the Act. As these standards have been developed through case law, it was considered impractical to attempt to formulate definitions in connection with this particular Act.

(7) Another group of public comments requested that the designations "extended family" and "member of a tribe" be defined. Both of these terms are defined either by tribal law or by tribal custom. Consequently, no definitions are offered in the regulations.

(8) Section 23.11(5). One comment sought the inclusion of terminology relating to termination proceedings resulting from juvenile delinquency court actions. No additional wording was added to this section because under 25 U.S.C. 1903(1) only placements—not terminations—based on acts of delinquency are excluded from coverage of the Act.

(9) Section 23.11. A comment was received which asked that notice be made to the tribe in all voluntary proceedings. This suggested change was not adopted because the legislation does not, in regard to voluntary proceedings, authorize notice to the tribe; therefore, inclusion of such a regulation would be beyond the scope of the Act.

(10) Section 23.11. An additional comment contended that state courts should be required to give notice "with due diligence." A regulation was not developed for this purpose due to the fact that the Secretary of the Department of the Interior does not have the authority to promulgate regulations governing the conduct of state courts.

(11) Section 23.11. Two comments posed questions relating to the protection of the civil rights of Indian children, and identified a felt need for the imposition of a specified time limitation restricting the required notice procedure. Approval of changes regarding these issues was not warranted because (a) the Indian Civil Rights Act provides the necessary protections, and (b) due to exigencies of individual cases, a rigid and restrictive time limitation would be impossible to structure.

(12) Section 23.11. One comment called for the insertion in the notice provision of the phrase "reasonable cause to believe that the child was an Indian child." Such an addition is not acceptable because it is not within the scope of the Act as written in the legislation.

(13) Section 23.12. One comment proposed that the regulations be modified to allow tribal organizations to act as designated agents, or as coordinators of the duties and services associated with designated agents, for the serving of notice. No regulatory change was made in this instance, as doing so would expand the substance of this section beyond the scope of the Act.

(14) Section 23.12. A single comment was received requesting that membership criteria be published for each of the various tribes. This request will not be complied with because the details of membership requirements are readily available through tribal headquarters offices and Bureau Area Offices. Secondarily, the body of information requested is so extensive as to make its publication within the regulations unfeasible.

(15) A large number of comments received suggested a variety of changes to be made in § 23.12. These suggestions and the reasons they were not adopted are summarized as follows:

A number of comments were received urging that the Department pay any voucher certified to it by a state court without examining it to determine whether the court was correct in concluding that the Bureau should pay. Except with respect to the determination of indigency, this recommendation has not been adopted. Congress has directed that these payments be made from funds managed by the Interior Department. As manager of these funds, this Department is charged by Congress with the responsibility of assuring they are spent only for a Congressionally-authorized purpose. Since this Department is held accountable for the use of these funds, it must retain ultimate authority to refuse payment requests if it believes payment is not authorized by the statute.

Under 25 U.S.C. 1912(b), however, Congress has authorized payment when "the court determines indigency." Since the Congress has left this determination to the courts, this Department will not make its own determination of that issue. Consequently, the provision authorizing the Area Director to refuse payment if the court has abused its discretion in determining indigency has been deleted.

One commenter objected to the use of state standards and procedures for payment of counsel in juvenile delinquency proceedings as the criteria for reasonable fees to be paid counsel under the Indian Child Welfare Act. The Department did consider having vouchers submitted directly to the Department by the attorneys without requiring prior approval by the state court. If that approach had been adopted, the Department would have developed procedures and criteria based on those employed by states where appointed counsel is paid in non-juvenile delinquency child custody cases. Since state courts already have substantial experience in paying appointed counsel in juvenile proceedings (because appointed counsel is clearly required by the U.S. Constitution), the Department concluded the courts were better prepared to make the initial determination as to the reasonableness of the fees requested by appointed attorneys. For that reason, the regulations provide for vouchers to be approved first by the state court. Under the regulations the Department will pay the amount approved by the court unless the Department is prepared to say that the court abused its discretion.

The regulations could have asked the state courts to apply procedures and criteria relating specifically to dependency proceedings. Those procedures and criteria, of course, would have been new to the states involved since the Department is not authorized by Congress to make payments in states where state law authorizes payment in dependency proceedings. The Department concluded administration of the program would be more orderly if states could use the procedures and criteria they are already using in other cases rather than having to apply new rules. There are, of course, differences between juvenile delinquency proceedings and dependency proceedings. But since delinquency proceedings more closely resemble the type of proceedings covered by the Act than do the proceedings for any other cases where all states pay appointed counsel, they were regarded as the best model.

Some commenters recommended that the deadline for the Area Director to act on the notice be reduced from 15 days to five days. The deadline has been reduced to ten days. This decision was based on a balancing of the need of attorneys to know promptly whether they are eligible to be paid and the Department's need for time to conduct a review to determine eligibility.

Some commenters recommended that income from Indian claims, trust funds and certain other sources not be considered in determining indigency. Since this determination is the responsibility of the state court rather than the Department, that recommendation has not been adopted. For the same reason, the requirements in the proposed rules that indigency be determined on the same basis as is used in juvenile delinquency proceedings has been deleted. These issues may be dealt with in the guidelines, however.

Some commenters recommended that the regulations provide for tribal involvement in the appointment of counsel. This recommendation has not been adopted because under 25 U.S.C. 1912(b) it is the responsibility of the court to appoint counsel. This responsibility has not been assigned to either the Department or to tribes. The courts may, however, wish to seek the assistance of either the Department or the tribe in identifying attorneys with suitable expertise to take these cases. This matter may also be included in the guidelines.

In response to comments, the Bureau Area Office to which notices of appointments are sent has been changed from the office serving the Indian child's tribe to the office designated in § 23.11 for receipt of other notices. A particular Area Office is designated for each state (exceptions noted below). This approach will mean that, in most instances, a state court can send all materials to the same Bureau address. (Arizona, New Mexico, Oklahoma and Utah are exceptions noted in the regulations.)

One comment made the request that a provision be written into the regulations obligating the Bureau to pay an attorney who is found to be ineligible if the Bureau should fail to disapprove payment before the deadline. This comment has not been adopted. Congress has authorized payments only in certain types of cases for certain types of representation. The Bureau is not authorized to pay money merely as compensation for its slowness. A new subsection (g) has been added stating that a person aggrieved by the failure of the Area Director to act promptly may treat that failure as a denial for purposes of administrative appeal.

Another comment was that the Bureau pay for work done by an attorney on a case he or she, in good faith, believed was an eligible Indian child welfare case up to the time that the attorney is notified that he or she is not eligible for Bureau payments. This comment was also rejected because the Act does not authorize payments based on the good faith of the attorney. If the case is not one covered by the Act, the Bureau is not authorized to pay the attorney regardless of that attorney's good faith beliefs.

(16) Section 23.81. Two additional comments maintained that state courts should be mandated to share with tribal courts all information on final adoptive orders for Indian children. This suggestion could not be incorporated into the regulations because, again, it calls for expansion of the content of the legislation beyond its intended scope.

(17) A comment was made that a central register be established under § 23.81(a) for the purpose of immediate collection and disclosure of information on adoptions. This suggestion extends beyond the scope of the intent of the Act.

(18) A comment was made calling for the identification of the tribal court involved with the child under section 23.81(a). This additional information appeared unnecessary considering the information already provided by the state court to the Secretary.

(19) One comment was made that the Bureau insure the provision of the remedial or rehabilitative services required under section 102(d) of the Act. For families located off-reservation, this can be interpreted as being beyond the authority of the Bureau in its provision of services to off-reservation Indians and is unrealistic due to staff and financial limitations.

(20) One comment was made that the Secretary conduct outreach activity to locate and identify prospective foster and adoptive homes in order to assist states in their efforts to comply with section 105(a) and (b) of the Act. This proposed change was not incorporated into the regulations, as doing so would constitute a duplication of services in that a number of special projects are already engaged in the active recruitment of Indian foster and adoptive families. Moreover, it should be noted that this issue is a responsibility of the states and must be met to fulfill the requirements of the Act.

(21) One comment was made that the Bureau publish in the Federal Register the various tribal placement preferences (refer to section 105(c) of the Act). This recommendation was not accepted because the Federal Register is not readily available to the population at large, and it is important that the tribes be contacted directly on these matters.

(22) Comments were received containing specific objections to Bureau of Indian Affairs involvement in regulating grants to be provided under Title II of Pub. L. 95-608. The responsibility for regulating these grants was given by the Act to the Secretary of the Interior who in turn has lawfully delegated that responsibility to the Assistant Secretary—Indian Affairs.

(23) A number of comments questioned use of the basic Pub. L. 93-638 Indian Self-Determination grant regulation format in relation to these Indian Child Welfare Act grant regulations. Related comments also questioned the various grant application review levels and time frames for Bureau action which generally conform to the Pub. L. 93-638 format. No changes were made in this regard since the Pub L. 93-638 format, and its application review levels and time frames for Bureau an applicant actions, has proven administratively feasible for both Bureau and grant applicants.

(24) Some comments received from Tribal governing bodies recommended that tribes be routinely given a proportionately higher ratio of available grant funds than that given Indian organizations. This recommendation was not adopted as the Act does not provide for such an advantage to tribes.

(25) Some comments objected to § 23.22, Purpose of grants, in its entirety. The rationale presented was that a sovereign tribal entity should not be restricted in any way in its decision as to how Federal grant funds will be utilized. The recommendation that §23.22 be entirely deleted was not adopted. The Act is specific in its direction that grants will be made for the establishment and operation of Indian Child and family service programs with the objective being the prevention of the breakup of Indian families. Section 23.22 attempts to make that basic point and provides examples of such programs without restricting applicants to those examples.

(26) A few comments pertained to the application selection criteria in § 23.25 and recommended that Indian

organizations which are not tribal governing bodies be able to apply for grants for on or "near" reservation programs. This change was not adopted as this Bureau is committed to working in a government-to-government relationship directly with and through tribal government relative to Bureau-funded programs on or "near" reservations. It is also noted that a tribal governing body may subgrant or subcontract its grant under this part to any Indian organization it wishes.

(27) A few comments pertained to funding available for grants under this part. One comment pointed out that subsidy programs for adopted children should take into account that adoptions are for life and that the grant regulations § 23.22(a)(5)) should provide for subsidies until the adopted child reaches majority. Another comment recommended that § 23.27(c) should delete reference to grant approvals being subject to availability of funds. No changes were made in this overall regard since the Bureau's appropriations are received from the Congress on an annual basis and the Bureau subsequently may only fund programs on a year-to-year basis dependent entirely upon funds appropriated by the Congress.

(28) One comment recommended that adoption subsidy grant programs, § 23.22(a)(5), be extended to legal guardians as well as to adoptive parents. This recommendation was not adopted as legal guardians can receive payments for foster care from established resources.

(29) One commenter suggested that § 23.81(b) be further clarified and expanded regarding the release of information and method of enrollment for eligible Indian adopted children. It was decided that the Chief Tribal Enrollment Officer only will certify to the tribe information necessary for enrolment where the parent has filed an affidavit of confidentiality. The reason for this change is to limit the number of people who might have access to this information, and to protect its confidential nature, as the Secretary is mandated to do under section 301 of this Act.

(30) Some comments recommended that grants for off reservation programs be provided only to governing bodies of Federally-recognized tribes. This recommendation was not adopted since it would unduly limit the specific role of off-reservation Indian organizations relative to implementation of the Act which specifically authorizes grants for these Indian Organizations.

(31) A comment was made pursuant to section 103(c) of the Act that the Bureau give notice to a parent that any adoption of a child for which the parent had voluntarily terminated parental rights can be invalidated within two years after the adoption if the parent can prove fraud or duress. This recommendation was not adopted because it was felt that this practice, on a general basis, would not be in the best interest of the children involved. If cases arise that warrant this type of assistance, such assistance may be provided on a case-by-case basis.

(32) A comment was made that under Section 105(e) of the Act, requirements should be established regarding the content of Indian child placement records maintained by the states. This recommended change was not adopted because the regulation of state social service agencies does not fall within the authority granted to the Secretary of the Interior.

The authority for issuing these regulations is contained in 5 U.S.C. 301 and sections 463 and 465 of the revised statutes (25 U.S.C. 2 and 9), and 209 DM 8. The primary authors of this document are Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, and David Etheridge, Office of the Solicitor, Department of the Interior.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Subchapter D, Chapter I, Title 25 of the Code of Federal Regulations is amended by adding a new Part 23, reading as follows:

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions and Policy

Sec.
23.1 Purpose.
23.2 Definitions.
23.3 Policy.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

23.11 Notice.
23.12 Designated tribal agent for service of notice.
23.13 Payment for appointed counsel in state Indian child custody proceedings.

Subpart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

23.21 Eligibility requirements.
23.22 Purpose of grants.
23.23 Obtaining application instructions and materials.
23.24 Content of application.

Sec.
23.25 Application selection criteria.
23.26 Request from tribal governing body or Indian organization.
23.27 Grant approval limitation.
23.28 Submitting application.
23.29 Agency Office review and recommendation.
23.30 Deadline for Agency Office action.
23.31 Area Office review and action.
23.32 Deadline for Area Office action.
23.33 Central Office review and decision.
23.34 Deadline for Central Office action.
23.35 Grant execution and administration.
23.36 Subgrants and subcontracts.

Subpart D—General Grant Requirements

23.41 Applicability.
23.42 Reports and availability of information to Indians.
23.43 Matching share.
23.44 Performing personal services.
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Subpart E—Grant Revision, Cancellation or Assumption

23.51 Revisions or amendments of grants.
23.52 Assumption.

Subpart F—Hearings and Appeals

23.61 Hearings.
23.62 Appeals from decision or action by Superintendent.
23.63 Appeals from decision or action by Area Director.
23.64 Appeals from decision or action by Commissioner.
23.65 Failure of Agency or Area Office to act.

Subpart G—Administrative Requirements

23.71 Uniform administrative requirements for grants.

Subpart H—Administrative Provisions

23.81 Recordkeeping and information availability.

Subpart I—Assistance to State Courts

23.91 Assistance in identifying witnesses.
23.92 Assistance in identifying interpreters.
23.93 Assistance in locating biological parents of Indian child after termination of adoption.

Authority: 5 U.S.C. 301; secs. 463 and 465 of the revised statutes (25 U.S.C. 2 and 9).

Subpart A—Purpose, Definitions, and Policy

§ 23.1 Purpose.

The purpose of the regulations in this Part is to govern the provision of administration and funding of the Indian Child Welfare Act of 1978 (Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901-1952).

§ 23.2 Definitions.

(a) "Act" means the Indian Child Welfare Act, Pub. L. 95-608 (92 Stat. 3073), 25 U.S.C. 1901 *et seq*.

(b) "Child custody proceeding," which shall mean and include:

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(1) "Foster care placement"—any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(2) "Termination of parental rights"—an action resulting in the termination of the parent-child relationship;

(3) "Preadoptive placement"—the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(4) "Adoptive placement"—the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(5) Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents. It does include status offenses, such as truancy, incorrigibility etc.

(c) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(d) "Indian" means: (1) *Jurisdictional Purposes:* For purposes of matters related to child custody proceedings any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 or the Alaska Native Claims Settlement Act (85 Stat. 688, 689).

(2) *Service eligibility for on or "near" reservation Children and Family Service Programs.* For purposes of Indian child and family service programs under section 201 of the Indian Child Welfare Act (92 Stat. 3075), any person who is a member, or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe.

(3) *Service eligibility for off-reservation Children and Family Service Programs:* For the purpose of Indian child and family programs under section 202 of the Indian Child Welfare Act (92 Stat. 3073) any person who is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendent, in the first or second degree, of any such member, or is an Eskimo or Aleut or other Alaska Native, or is considered by the Secretary of the Interior to be an Indian for any purpose, or is determined to be an Indian under regulations promulgated by the Secretary of Health, Education, and Welfare. Membership status is to be determined by the tribal law, ordinance, or custom.

(e) "Indian child" means any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(f) "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or is eligible for membership or (2) in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. (Refer to Guidelines for State Courts-Indian Child Custody Proceedings.)

(g) "Indian custodian" means any Indian person(s) who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(h) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(i) "Indian tribe" means any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended.

(j) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

(k) "Reservation" means Indian country as defined in section 1151 of Title 18, United States Code, and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual subject to a restriction by the United States against alienation.

(l) "State Court" means any agent or agency of a State including the District of Columbia or any territory or possession of the United States or any political subdivisions empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

(m) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings

(n) For other applicable definitions refer to 25 CFR 20.1 and 271.2.

§ 23.3 Policy.

The policy of the Act and of these regulations is to protect Indian children from arbitrary removal from their families and tribal affiliations by establishing procedures to insure that measures to prevent the breakup of Indian families are followed in child custody proceedings. This will insure protection of the best interests of Indian children and Indian families by providing assistance and funding to Indian tribes and Indian organizations in the operation of child and family service programs which reflect the unique values of Indian culture and promote the stability and security of Indian families. In administering the grant authority for Indian Child and Family Programs it shall be Bureau policy to emphasize the design and funding of programs to promote the stability of Indian families.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

§ 23.11 Notice.

(a) If the identity or location of the parents, Indian custodians or the Indian child's tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by registered mail with return receipt requested to the appropriate address listed in paragraph (b) of this section.

(b)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notice should be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 1951 Constitution Avenue NW., Washington, D.C. 20245.

(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio or Wisconsin, notice should be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 831-2nd Avenue, S., Minneapolis, Minnesota 55402.

(3) For proceedings in Nebraska, North Dakota, or South Dakota, notice should be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115-4th Avenue, SE., Aberdeen, South Dakota 57401.

(4) For proceedings in Kansas, Texas, and the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blain, Bryan, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward, notice should be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005.

(5) For proceedings in Montana or Wyoming notice should be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101.

(6) For proceedings in Colorado or New Mexico, (exclusive of those New Mexico counties listed in paragraph (b)(9) below), notice should be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 5301 Central Avenue, NE., P.O. Box 8327, Albuquerque, New Mexico 87108.

(7) For proceedings in Alaska notice should be sent to the following address: Juneau Area Director, Bureau of Indian Affairs, P.O. Box 3-8000, Juneau, Alaska 99801.

(8) For proceedings in Arkansas, Missouri, and all Oklahoma counties not listed under paragraph (b)(4) above, notice should be sent to the following address: Muskogee Area Director, Bureau of Indian Affairs, Federal Building, Muskogee, Oklahoma 74401.

(9) For proceedings in the Arizona counties of Apache, Coconino, and Navajo; the New Mexico counties of McKinley, San Juan, and Socorro; and the Utah county of San Juan, notice should be sent to the following address: Navajo Area Director, Bureau of Indian Affairs, Window Rock, Arizona 86515.

(10) For proceedings in Arizona (exclusive of those counties listed in paragraph (b)(9) above), Nevada, or Utah (exclusive of that county listed in paragraph (b)(9) above), notice should be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, P.O. Box 7007, Phoenix, Arizona 85011.

(11) For proceedings in Idaho, Oregon or Washington, notice should be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 1425 N.E. Irving Street, Portland, Oregon 97208.

(12) For proceedings in California or Hawaii, notice should be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 85011.

(c) Notice shall include the following information if known:

(1) Name of the Indian child, birthdate, birthplace,

(2) Indian child's tribal affiliation,

(3) Names of Indian child's parents or Indian custodians, including birthdate, birthplace, and mother's maiden name, and

(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

(d) Upon receipt of the notice, the Bureau shall make a diligent effort to locate and notify the Indian child's tribe and the Indian child's parents or Indian custodians. Such notice may be by registered mail with return receipt requested or by personal service and shall include the information provided under subsection (c) of this section in addition to the following:

(1) A statement of the right of the biological parents, Indian custodians and the Indian tribe to intervene in the proceedings.

(2) A statement that if the parent(s) or Indian custodian(s) is unable to afford counsel, counsel will be appointed to represent them.

(3) A statement of the right of the parents, the Indian custodians and the child's tribe to have, upon request, up to twenty additional days to prepare for the proceedings.

(4) The location, mailing address and telephone number of the court.

(5) A statement of the right of the parents, Indian custodians and the Indian child's tribe to petition the court for transfer of the proceeding to the child's tribal court, and their right to refuse to permit the case to be transferred.

(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the parents or Indian custodians.

(7) A statement that, since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Act.

(e) The Bureau shall have ten days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and parents or Indian custodians and send a copy of the notice to the court. If within the ten-day time period the Bureau is unable to verify that the child is in fact an Indian, or meets the criteria of an Indian child as defined in section (4) of the Act, or is unable to locate the parents or Indian custodians, the Bureau shall so inform the court prior to initiation of the proceedings and state how much more time, if any, it will need to complete the search. The Bureau shall complete its search efforts even if those efforts cannot be completed before the child custody proceeding begins.

(f) Upon request from a potential participant in an anticipated Indian child custody proceeding, the Bureau shall attempt to identify and locate the Indian child's tribe, parents or Indian custodians for the person making the request.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice may designate by resolution, or by such other form as the tribal constitution or current practice requires, an agent for service of such notice other than the tribal chairman and send a copy of the designation to the Secretary. The Secretary shall publish the name and address of the designated agent in the Federal Register on an annual basis. A current listing of such agents will be maintained by the Secretary and will be available through the Area Offices.

§ 23.13 Payment for appointed counsel in state Indian child custody proceedings.

(a) When a state court appoints counsel for an indigent party in an Indian child custody proceeding, for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the Bureau of Indian Affairs Area office designated for that state in § 23.11 of this part. The notice shall include the following:

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(1) Name, address and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the client is indigent.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the Bureau of Indian Affairs unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C.1903(1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), or the child's Indian custodian as defined in 25 U.S.C.1903(6);

(4) State law provides for appointment of counsel in such procedings;

(5) The notice of the Area Director of appointment of counsel is incomplete; or

(6) No funds are available for such payments.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the Bureau of Indian Affairs. In the event that certification is denied, the notice shall include written reasons for that decision together with a statement that the Area Director's decision may be appealed to the Commissioner of Indian Affairs under the provisions of the 25 CFR Part. 2.

(d) When determining attorney fees and expenses the court shall:

(1) Determine the amount of payments due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in juvenile delinquency procedings.

(2) Submit approved vouchers to the Area Director who certified eligibility for Bureau payment together with the court's certification that the amount requested is reasonable under the state standards and considering the work actually performed in light of the criteria that apply in determining fees and expenses for appointed counsel in juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The court has abused its discretion under state law in determining the amount of the fees and expenses; or

(2) The client has not been previously certified as eligible under paragraph (c) of this section.

(f) No later than 15 days after receipt of a payment voucher the Area Director shall send written notice to the court, the client and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that the decision of the Area Director may be appealed to the Commissioner under the procedures of 25 CFR Part 2.

(g) Failure of the Area Director to meet the deadlines specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraphs (f) of this section.

Supart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

§ 23.21 Eligibility requirements.

The governing body of any tribe or tribes, or any Indian organization, including multi-service Indian centers, may apply individually or as a consortium for a grant under this part.

§ 23.22 Purpose of grants.

Grants are for the purpose of:

(a) Establishment and operation of Indian child and family service programs. Examples of such programs may include but are not limited to:

(1) Operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children.

(2) Family assistance (including homemaker and home counselors), day care, afterschool care recreational activities, respite care, and employment.

(3) Employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters.

(4) Education and training of Indians (including tribal court judges and staff) in skills relating to child and family assistance and service programs.

(5) Subsidy programs under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs.

(6) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings.

(7) Home improvements programs.

(8) Preparation and implementation of child welfare codes. An example in this regard is establishment of a system for licensing or otherwise regulating Indian foster and adoptive homes.

(b) Providing matching shares for other Federal or non-Federal grant programs as prescribed in § 23.43.

§ 23.23 Obtaining application instructions and materials.

Application instructions and related application materials may be obtained from Superintendents, Area Directors or the Commissioner.

§ 23.24 Content of application.

Application for a grant under this part shall include:

(a) Name and address of Indian tribal governing body(s) or Indian organization applying for a grant.

(b) Descriptive name of project.

(c) Federal funding needed.

(d) Population directly benefiting from the project.

(e) Length of project.

(f) Beginning date.

(g) Project budget categories or items

(h) Program narrative statement.

(i) Certification or evidence of request by Indian tribe or board of Indian organization.

(j) Name and address of Bureau office to which application is submitted.

(k) Date application is submitted to Bureau, and

(l) Additional information pertaining to grant applications for funds to be used as matching shares will be requested as prescribed in § 23.43.

§ 23.25 Application selection criteria.

(a) The Commissioner or designated representative shall select for grants under this part those proposals which will in his or her judgment best promote the purposes of title II of the Act taking into consideration insofar as practicable the following factors:

(1) The number of actual or estimated Indian child placements outside the home, the number of actual or estimated Indian family breakups, and the need for directly-related preventive programs, all as determined by analysis of relevant statistical and other data available from tribal and public court records and from

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the records of tribal, Bureau, public and private social services agencies serving Indian children and their families.

(2) The relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing prevention of Indian family breakup. Factors to be considered in determining relative accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Lack of programs which provide free service to indigent families;

(v) Technical barriers created by existing public or private programs;

(vi) Availability of Transportation to existing programs;

(vii) Distance between the Indian community to be served under the proposal and the nearest existing program;

(viii) Quality of service provided to Indian clientele; and

(ix) Relevance of service provided to specific needs of Indian clientele.

(3) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup, taking into consideration all factors listed in paragraphs (a) (1) and (2) above.

(b) Selection for grants under this part for on or "near" reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract with another organizational entity including but not limited to an Indian organization, subject to the provisions of § 23.30.

(c) Preference for selection for grants under this part for off-reservation programs shall be given to those off-reservation Indian organizations which show evidence of substantial support from the Indian community or communities to be served by the grant. However, the Indian organization may make a subgrant or subcontract subject to the provisions of § 23.30. Factors to be considered in determining substantial support include:

(1) Letters of support from individuals and families to be served;

(2) Local Indian community representation in and control over the Indian entity requesting the grant.

(3) The requirements of this subsection do not apply in the case of an existing multi-service Indian center or an off-reservation Indian organization of demonstrated ability which has operated and continues to operate an Indian child welfare or family assistance program.

§ 23.26 Request from tribal governing body or Indian organization.

(a) The Bureau shall only make a grant under this part for an on or "near" reservation program when officially requested to do so by a tribal governing body. This request may be in the form of a tribal resolution, an endorsement included in the grant application or such other forms as the tribal constitution or current practice requires.

(b) The Bureau shall only make a grant under this part for an off-reservation program when officially requested to do so by the governing body of an Indian organization. This request may be in one of the forms prescribed in (a) above and shall be further subject to the provisions of § 23.25(c) (1), (2), and (3) above.

§ 23.27 Grant approval limitation.

(a) *Area Office approval.* Authority for approval of a grant application under this part shall be with the Area Director when the intent, purpose and scope of the grant proposal pertains solely to an Indian tribe or tribes, or to an Indian organization representing an off-reservation community, located within that Area Director's administrative jurisdiction.

(b) *Central Office approval.* Authority for approval of a grant application under this part shall be with the Commissioner when the intent, purpose and scope of the grant proposal pertains to Indian tribes, off-reservation communities or Indian organizations representing different Area Office administrative jurisdictions but located within the Commissioner's overall jurisdiction.

(c) Grant approvals under this section shall be subject to availability of funds. These funds will include those which are:

(1) Directly appropriated for implementation of this Act. Distribution to approved applicants of these appropriated and available funds will be based upon a formula designed to ensure insofar as possible that all approved applicants receive a proportionately equitable share sufficient to fund an effective program. This formula will be published as a Federal Register Notice.

(2) Appropriated under other Acts for Bureau programs which are related to the purposes prescribed in § 23.22.

§ 23.28 Submitting application.

(a) *Agency Office.* An application for a grant under this part for an on or "near" reservation program shall be initially submitted to the appropriate Superintendent for review and recommendation as prescribed in § 23.29.

(b) *Area Office.* An application for a grant under this part for an off-reservation program shall be initially submitted to the appropriate Area Director for review and action as prescribed in § 23.31.

§ 23.29 Agency Office review and recommendation.

(a) Recommendation for approval or disapproval of a grant under this part shall be made by the Superintendent when the intent, purpose and scope of the grant proposal pertains to or involves an Indian tribe or tribes located within that Superintendent's administrative jurisdiction.

(b) Upon receipt of an application for a grant under this part, the Superintendent shall:

(1) Acknowledge receipt of the application in writing within 10 days of its arrival at the Agency Office.

(2) Review the application for completeness of information and promptly request any additional information which may be required to make a recommendation.

(3) Assess the completed application for appropriateness of purpose as prescribed in § 23.22, and for overall feasibility.

(4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediments which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.

(5) Recommend approval or disapproval following full assessment of the completed application and forward the application and recommendation to the Area Director for further action.

(6) Promptly notify the applicant in writing as to the final recommendation. If the final recommendation is for disapproval, the Superintendent will include in the written notice to the applicant the specific reasons therefor.

(7) In instances where a joint application is made by tribes representing more than one Agency Office administrative jurisdiction, copies of the application shall be provided by the applicants to each involved Superintendent for review and recommendation as prescribed in this section.

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§ 23.30 Deadline for agency office action.

Within 30 days of an application for a grant under this part, the Superintendent shall take action as prescribed in § 23.29. Extension of this deadline will require consultation with, and written consent of, the applicant.

§ 23.31 Area office review and action.

(a) Upon receipt of an application for a grant requiring Area Office approval, the Area Director shall:

(1) Review the application following applicable review procedures prescribed in § 23.29.

(2) Review the Superintendent's recommendation as it pertains to the application.

(3) Approve or disapprove the application.

(b) In instances where a joint application is made by tribes representing more than one Area Office administrative jurisdiction, the Area Director shall add his or her recommendation for approval or disapproval to that of the Superintendent and shall forward the application and recommendations to the Commissioner for further action.

(c) Upon taking action as prescribed in paragraphs (a) and (b) of this section, the Area Director shall promptly notify the applicant in writing as to the action taken. If the action taken is disapproval or recommendation for disapproval of the application, the Area Director will include in the written notice the specific reasons therefor.

§ 23.32 Deadline for Area Office action.

Within 30 days of receipt of an application for a grant under this part, the Area Director shall take action as prescribed in § 23.31. Extension of this deadline will require consultation with, and written consent of, the applicant.

§ 23.33 Central Office review and decision.

Upon receipt of an application for a grant requiring Central Office approval, the Commissioner shall:

(a) Review the application following the applicable review procedures prescribed in § 23.29.

(b) Review Agency and Area Office recommendations as they pertain to the application.

(c) Approve or disapprove the application.

(d) Promptly notify the applicant in writing as to the approval or disapproval of the application. If the application is disapproved, the Commissioner will include in the written notice the specific reasons therefor.

§ 23.34 Deadline for Central Office action.

Within 30 days of receipt of an application for a grant under this part the Commissioner shall take action as prescribed in § 23.23. Extension of this deadline will require consultation with a written consent of the applicant.

§ 23.35 Grant execution and administration.

(a) Grant approved pursuant to § 23.27(a) shall be executed and administered at the Area Office level.

(b) Grants approved pursuant to § 23.27(b) shall be executed and administered at the Central Office level provided that the Commissioner may designate an Area Office to execute or administer such a grant.

§ 23.36 Subgrants and subcontracts.

The grantee may make subgrants or subcontracts under this part provided that such subgrants or subcontracts are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

Subpart D—General Grant Requirements

§ 23.41 Applicability.

The general requirements for grant administration in this part are applicable to all Bureau grants provided to tribal governing bodies and to Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute or regulation.

§ 23.42 Reports and availability of information to Indians.

Any tribal governing body or Indian organization receiving a grant under this part shall make information and reports concerning that grant available to the Indian people which it serves or represents. Access to these data shall be requested in writing and shall be made available within 10 days of receipt of that request, subject to any exceptions provided for in the Freedom of Information Act (5 U.S.C. 552), as amended by the Act of November 21, 1974 (Pub. L. 93-502; 88 Stat. 1561).

§ 23.43 Matching share.

(a) Specific Federal laws notwithstanding, grant funds provided under this part for on or "near" reservation programs may be used as non-Federal matching share in connection with funds provided under Titles IVB and XX of the Social Security Act or under any other Federal or non-Federal programs which contribute to the purposes specified in § 23.22.

(b) In the establishing, operating and funding of Indian child and family service programs both on, "near" or off-reservation, the Secretary of the Interior may enter into agreements with the Secretary of Health, Education, and Welfare for the use of funds appropriated for similar programs of the Department of Health, Education, and Welfare.

(c) Superintendents, Area Directors, and their designated representatives will, upon tribal or Indian organization request, assist in obtaining information concerning other Federal agencies with matching fund programs and will, upon request, provide technical assistance in developing applications for submission to those Federal agencies.

§ 23.44 Performing personal services.

Any grant provided under this part may include provisions for the performance of personal services which would otherwise be performed by Federal employees.

§ 23.45 Penalties.

If any officer, director, agent, employee of, or anyone connected with any recipient of a grant, subgrant contract or subcontract under this part, does embezzle, willfully misapply, steal, or obtain by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract or subcontract, he or she may be subject to penalties as provided in 18 U.S.C. 1001.

§ 23.46 Fair and uniform services.

Any grant provided under this part shall include provisions to assure the fair and uniform provision by the grantee of services and assistance to all Indians included within or affected by the intent, purpose and scope of that grant.

Subpart E—Grant Revision, Cancellation or Assumption

§ 23.51 Revisions or amendments of grants.

(a) Request for budget revisions or amendments to grants awarded under this part shall be made as provided in § 270.14 of this Chapter.

(b) Requests for revisions or amendments to grants provided under this part, other than budget revisions referred to in paragraph (a) of this section, shall be made to the Bureau officer responsible for approving the grant in its original form. Upon receipt of a request for revisions or amendments to grants, the responsible Bureau officer shall follow precisely the same review procedures and time specified in § 23.29.

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§ 23.52 Assumption.

(a) When the Bureau cancels a grant for cause as specified in § 270.15 of this Chapter, the Bureau may assume control or operation of the grant program, activity or service. However, the Bureau shall not assume a grant program, activity or service that it did not administer before tribal grantee control unless the tribal grantee and the Bureau agree to the assumption.

(b) When the Bureau assumes control or operation of a grant program cancelled for cause, the Bureau may decline to enter into a new grant agreement until satisfied that the cause for cancellation has been corrected.

Subpart F—Hearings and Appeals

§ 23.61 Hearings.

Hearings referred to in § 270.15 of this Chapter shall be conducted as follows:

(a) The grantee and the Indian tribe(s) affected shall be notified in writing, at least 10 days before the hearing. The notice should give the date, time, places, and purpose of the hearing.

(b) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within 5 days following the hearing.

(c) The hearing will be conducted on as informal a basis as possible.

§ 23.62 Appeals from decision or action by Superintendent.

(a) A grantee may appeal any decision made or action taken by a Superintendent under this part. Such appeal shall be made to the Area Director as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.63 Appeals from decision or action by Area Director.

(a) A grantee may appeal any decision made or action taken by an Area Director under this part. Such appeal shall be made to the Commissioner as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.64 Appeals from decision or action by Commissioner.

(a) A grantee may appeal any decision made or action taken by the Commissioner under this part only as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.65 Failure of Agency or Area Office to act.

Whenever a Superintendent or Area Director fails to take action on a grant application within the time limits established in this part, the applicant may at its option, request action by the next higher Bureau official who has approval authority as prescribed in this part. In such instances, the Superintendent or Area Director who failed to act shall immediately forward the application and all related materials to that next higher Bureau official.

Subpart G—Administrative Requirements

§ 23.71 Uniform administrative requirements for grants.

Administrative requirements for all grants provided under this part shall be those prescribed in Part 276 of this Chapter.

Subpart H—Administrative Provisions

§ 23.81 Recordkeeping and information availability.

(a) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary of the Interior within 30 days a copy of said decree or order, together with any information necessary to show:

(1) Name of the child, the tribal affiliation of the child, and the Indian blood quantum of the child:

(2) Names and addresses of the biological parents and the adoptive parents;

(3) Identity of any agency having relevant information relating to said adoption placement.

To assure and maintain confidentiality where the biological parent(s) have by affidavit requested their identity remain confidential, a copy of such affidavit shall be provided the Secretary.

Such information, pursuant to Section 301(a) of the Act, shall not be subject to the Freedom of Information Act (5 U.S.C. 552) as amended. The Secretary shall insure that the confidentiality of such information is maintained.

The proper address for transmittal of information required by Section 301(a) of the Act is: Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, D.C. 20245. The envelope containing all such information should be marked "Confidential." This address shall be sent to the highest court of Appeal, the Attorney General and Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, there is no objection to that agency assuming reporting responsibilities for the purpose of this Act.

(b) The Division of Social Services, Bureau of Indian Affairs is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of the adopted Indian individual over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for enrollment or determining any rights or benefits associated with membership except the name of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible to request such information under the Act. The Chief Tribal Enrollment officer of the Bureau of Indian Affairs is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit requested anonymity. In such cases, the Chief Tribal Enrollment Officer shall certify to the child's tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by said tribe.

Subpart I—Assistance to State Courts

§ 23.91 Assistance in identifying witnesses.

Upon the request of a party in an involuntary child custody proceeding or of a court the Secretary shall assist in identifying qualified expert witnesses. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings are initiated. Refer to § 23.11(b).

§ 23.92 Assistance in identifying interpreters.

Upon the request of a party in any Indian child custody proceeding or of a court the Secretary shall assist in identifying interpreters. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings are initiated. Refer to § 23.11(b).

§ 23.93 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary shall assist in locating the biological parents or prior Indian custodian of an Indian adopted child whose adoption has been terminated. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings occur. Refer to § 23.11(b).

Forrest J. Gerard,

Assistant Secretary, Indian Affairs.

[FR Doc. 79-23441 Filed 7-30-79 8:45 am]

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